Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-678

IN THE
Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

JOINT APPENDIX

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Docketed 10/26/79
Jurisdiction Postponed 6/16/80

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RELEVANT DOCKET ENTRIES

Date	Identification
August 15, 1974	Complaint in Inverse Condemnation and Petition for Writ of Mandate filed in San Diego County Superior Court by property owner. (Jt. App. 4)*
September 24, 1974	City Demurrers to Complaint
November 12, 1974	Amendment to Complaint seeking Declaratory Relief (Jt. App. 32)
November 13, 1974	Demurrer to Mandamus Causes of Action Sustained, Demurrer to Inverse Condemnation Cause of Action Overruled
November 24, 1974	Answer to Complaint and Amended Complaint.
January 8, 1976	Order entered for a separate trial on issue of liability.
January 19, 1976	Liability phase of trial begins in San Diego County Superior Court before the Honorable Jack R. Levitt.
April 9, 1976	Findings of Fact and Conclusions of Law, finding for the property owner, entered by the trial court. (Jt. App. 35)
May 3, 1976	Damage phase, tried before jury, begins before the Honorable Jack R. Levitt.

* References to the Joint Appendix will be cited at "Jt. App". References to Appendix to Jurisdictional Statement hereinafter will be cited as "J.S. App.".

Date	Identification
October 8, 1976	Judgment, awarding money damages to property owner, entered by the trial court. (Jt. App. 44)
October 18, 1976	Notice of appeal to California Court of Appeal, Fourth Appellate District, Division One, filed by City.
May 17, 1978	Judgment affirmed by the Court of Appeal. (Jt. App. 48)
June 13, 1978	Petition for Rehearing Denied. (J.S. App. C)
July 13, 1978	Hearing granted by the California Supreme Court. (J.S. App. D)
June 14, 1979	California Supreme Court sent the case to the Court of Appeal for reconsideration in light of *Agins v. Tiburon*. (J.S. App. E)
June 26, 1979	California Court of Appeal, Fourth Appellate District, Division One, reversed judgment of trial court. (Jt. App. 62)
July 9, 1979	Petition for Rehearing denied. (J.S. App. H)
August 22, 1979	Petition for Hearing by California Supreme Court denied. (J.S. App. H)
October 3, 1979	Notice of Appeal to the Supreme Court filed. (J.S. App. J)

RELEVANT PLEADINGS, INSTRUCTIONS, FINDINGS, CONCLUSIONS, OR OPINIONS

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2. Amendment to the Complaint filed on November 12, 1974	32
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AUG 15 4 31 PM '74
CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor, F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive, Defendants.	No. 357022 COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION AND PETITIONS FOR WRIT OF MANDAMUS AND RELATED RELIEF Amendment Filed 11-12-74

Plaintiff complains of the defendants and each of them as follows:

FIRST CAUSE OF ACTION

(Taking or Damaging Property By Inverse Condemnation)

I

Plaintiff, SAN DIEGO GAS & ELECTRIC COMPANY, is a California corporation existing under the laws of the State of California and is, and at all times mentioned herein was, the owner of three parcels of real property located in the City of

San Diego in an area commonly known as the Sorrento Valley, immediately adjacent to the Sorrento Valley Industrial Park complex. The first of said parcels is described on Exhibit "A" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel A". The second parcel is described on Exhibit "B" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel B". The third parcel is described on Exhibit "C" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel C". All three parcels, for purposes of convenience, may hereinafter be referred to collectively as the "subject property".

II

At all times herein mentioned, defendant CITY OF SAN DIEGO was and is a municipal corporation under its charter and under the laws and statutes of the State of California. Said defendant shall hereinafter be referred to as "the City".

III

The remaining named defendants were and are officers of the CITY OF SAN DIEGO, as follows:

PETE WILSON, Mayor;

F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council;

JAMES L. GOFF, Planning Director.

IV

Plaintiff is unaware of the true names and capacities of the defendants sued herein by fictitious names DOES I through XXV, inclusive, and will seek leave of Court to substitute the true names and capacities of said defendants when same have been ascertained. Plaintiff is informed and believes, and upon such information and belief alleges, that the defendants, and each of them, sued herein under fictitious names were and are the agents, servants, and employees of each of the named defendants, and are responsible for the injuries alleged herein and are necessary for the granting of the relief sought herein.

V

The subject property was acquired by plaintiff, SAN DIEGO GAS & ELECTRIC COMPANY, in 1966. At that time, there were discussions between plaintiff and authorized representatives of the CITY OF SAN DIEGO with regard to the suitability of the subject property for use by plaintiff for development and expansion of its operating facilities, and, in fact, some 25 acres, a portion Parcel C, were purchased directly from the CITY OF SAN DIEGO for the express purpose of forming a part of an assemblage then being acquired by plaintiff for such purposes.

VI

In 1972, the San Diego City Council directed the Planning Commission to initiate public hearings upon the rezoning of the subject property to A-1-10 or "any other appropriate zone". Plaintiff is informed and believes, and upon such information and belief alleges, that concurrently with said action, and continuing thereafter, the City, through its Planning Department and its Community Development Department, engaged in

activities which were planned, coordinated, and implemented with the conscious design and intent to deprive plaintiff of any practical, beneficial or economical use of the subject property and, in fact, to take plaintiff's property for public use without compensation or to reduce dramatically the amount of the compensation which would have to be paid if the City subsequently acquired the property by exercise of its power of eminent domain. The actions taken by defendants, and each of them, including the City and its departments and agencies, in furtherance of said design and intent include, but are not limited to, the following.

VII

The Planning Department prepared a plan entitled, "A Plan for the Preservation of Natural Parks for San Diego," a proposed open space element to the City's General Plan, and scheduled public hearings thereon. A noticed public hearing before the Planning Commission was held on May 16, 1973, to consider a plan which designated Parcel A and a portion of Parcel C as open space. The hearing was continued to May 23, 1973, for determination. Plaintiff is informed and believes, and upon such information and belief alleges, that prior to the May 23, 1973 hearing, the Planning Department, in consultation with the Community Development Department, without notice to the public or to plaintiff, revised the plan under consideration to include Parcel B and additional portions of Parcel C. A plan in the latter form was adopted on May 23, 1973, by the Planning Commission and sent to the City Council for action.

VIII

Plaintiff is informed and believes, and upon such information and belief alleges, that concurrently with the actions set forth

herein above and in consultation with the Planning Department, the Community Development Department was preparing plans for acquisition by purchase of land by the City for open space. The Community Development Department prepared and distributed a report entitled, "Staff Reprt, Park Reserve Systems, April 29, 1973" which contained a map designated Parcels A, B and C for acquisition as open space. Said report further contained a proposal for funding of said purchase by bonds, and specifically allocated funds to be used for the purchase of plaintiff's property. Plaintiff is informed and believes that the funds allocated in said report were grossly inadequate for the purchase of the subject property at its then existing zoning and condition, but rather that the allocation clearly illustrates the intent of defendants to acquire the subject property only after its value had been dramatically reduced by the change of zoning and imposition for other restrictive conditions. Said report was presented to the City Council meeting in conference on May 30, 1973. Subsequently, the report was adopted by the Council and the bond proposal was placed upon the September 18, 1973, ballot as Proposition B. In conjunction with said ballot proposition, defendants released to the news media information depicting in graphic detail the entire subject property as property sought to be acquired, and said information was widely desseminated to the public.

IX

On April 11, 1973, the Planning Commission down-zoned Parcel A from M-1A to A-1-10, but voted to retain the existing M-1A zoning on Parcel B, and voted to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan.

X

On June 7, 1973, the City Council adopted the recommendation of the Planning Commission and down-zoned Parcel A from M-1A to A-1-10, while voting to retain the existing M-1A zoning on Parcel B, and voting to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan, all despite the fact that all of the subject property was designated for industrial use on the City of San Diego General Plan 1990, adopted by the City Council on January 27, 1972.

XI

On June 19, 1973, the City Council accepted the recommendation of the Planning Commission and adopted the open space plan described in the report entitled, "A Plan for the Preservation of Natural Parks for San Diego", thereby completing the implementation of the aforesaid design, by means of resolution or ordinance, and depriving plaintiff of any practical, beneficial or economical use of the subject property. Said action was taken without proper notice to plaintiff or to the public of the nature and extent of the application of the open space plan to the subject property, and, in fact, the Plan was filed with the City Clerk prior to the public hearing indicated taht only Parcel A and a portion of Parcel C were proposed to be included in the open space plan. The Plan as adopted purported to include all of Parcels A, B, and C in the open space plan, even though there was no notice to plaintiff that such action was contemplated and no discussion of same at the public hearing.

XII

Plaintiff is informed and believes, and upon such information and belief alleges, that the plan, purpose, design and intention of defendants and each of them, in connection with their actions as alleged herein, was and is to limit the subject property to public use as open space and to render said property unusable for any other purpose, and upon the implementation as hereinabove alleged by resolution and/or ordinance, said design and intent was fulfilled and in all practical effect the subject property has by the aforesaid actions of the defendants been presently taken and devoted to public use as open space. Plaintiff is informed and believes, and upon such information and belief alleges, that a further plan, purpose and intention of defendants, and each of them, in connection with their actions, as alleged herein, was and is to substantially reduce the value of the subject property so that said property might be acquired by the CITY OF SAN DIEGO for public use in the future at a greatly reduced value.

XIII

No action in eminent domain has been taken by the CITY OF SAN DIEGO within six months from the actions taken on June 7, 1973, and June 19, 1973, as herein alleged, in order to take the subject property or any portion thereof, as provided in Section 1243.1 of the California Code of Civil Procedure.

XIV

Accordingly, on June 6, 1974, plaintiff's representatives submitted a claim, pursuant to the California Government Code, to the CITY OF SAN DIEGO. A copy of said claim is attached hereto, marked as Exhibit "D", and is incorporated herein by

reference. On August 5, 1974, a denial of said claim was issued. A copy of said denial is attached hereto as Exhibit "E", and is incorporated herein by reference.

XV

The aforesaid acts of defendants, and each of them, were and are arbitrary, oppressive, unreasonable and an unreasonable exercise of the purported police power of the City. Said acts constitute an unlawful taking or damaging, or both, of the subject property owned by plaintiff. As a result of the aforesaid acts of defendants, and each of them, plaintiff has been presently denied in all practical effect any possible beneficial or economical use of the subject property.

XVI

The damage or loss to plaintiff from the conduct of defendants, as alleged hereinabove, is the approximate sum of $6,150,000.00, plus reasonable interest on said amount, plus such sum as will reimburse plaintiff for its reasonable costs and disbursements, including reasonable attorneys' fees, appraisal and engineering fees, actually incurred because of this proceeding, as provided in California Code of Civil Procedure, Section 1246.3.

SECOND CAUSE OF ACTION
AND PETITION FOR WRIT OF MANDATE
(CCP §1084)

Petitioner SAN DIEGO GAS AND ELECTRIC COMPANY petitions this Court for a writ of mandamus under Code of Civil Procedure Section 1084, directed to respondent CITY OF SAN DIEGO, and in support thereof alleges as follows:

I

Petitioner repeats and repleads each, every and all of the allegations contained in Paragraphs I through XVI of its First Cause of Action, and incorporates the same herein by reference as though fully set forth.

II

For the reasons set forth as the contentions and allegations of petitioner in its First Cause of Action, and upon the facts set forth in Paragraphs I through XVI of said First Cause of Action, all of which is incorporated herein by reference, petitioner alleges that the actions of respondent were arbitrary, oppressive, unreasonable and an unlawful exercise of the purported police power of the City, in abuse of its discretion.

III

The adoption of the proposed open-space element to the City's General Plan, as alleged herein, without notice to the public or to petitioner of the nature and extent of the impact of said element upon the subject property, constituted a denial of due process and an unlawful taking and/or damaging of petitioner's property without due process of law.

IV

Petitioner has exhausted all administrative remedies, if any, available to petitioner under the circumstances.

V

Petitioner does not have a plain, speedy, or adequate remedy at law for the actions taken by the CITY OF SAN DIEGO and each of the other respondents herein.

THIRD CAUSE OF ACTION AND PETITION FOR WRIT OF MANDATE
(CCP §1094.5)

Petitioner SAN DIEGO GAS & ELECTRIC COMPANY petitions this court for a writ of mandamus under Code of Civil Procedure, Section 1094.5, directed to respondent CITY OF SAN DIEGO, and in support thereof alleges as follows:

I

Peitioner [*sic*] repeats and repleads each, every and all of the allegations contained in Paragraphs I through XVI of this First Cause of Action and Paragraphs I through V of its Second Cause of Action, and incorporates the same herein by reference as though fully set forth herein.

II

For the reasons set forth hereinabove and upon the facts alleged herein, all of which are incorporated herein by reference, petitioner alleges that the actions of respondent were arbitrary, oppressive, unreasonable and an unlawful exercise of the purported police power of respondent, in abuse of its discretion.

III

The adoption of the proposed open space element to the City's General Plan, as alleged herein, without notice to the public or to petitioner of the nature and extent of the impact of said element upon the subject property, consituted a denial of due process and denied petitioner a fair hearing on said element, and thereby constituted an unlawful taking and/or damaging of petitioner's property without due process.

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them, as follows:

1. For the principal sum of $6,150,000.00, together with reasonable interest thereon, from and after the date of taking and/or damaging of plaintiff's property;

2. For plaintiff's reasonable costs, disbursements and expenses, including reasonable attorneys' fees, and appraisal and engineering fees, in accordance with California Code of Civil Procedure §1246.3;

3. That a preemptory writ of mandate be issued under seal of this court ordering respondent, CITY OF SAN DIEGO, through its officers and agents, to set aside the re-zoning of that portion of the subject property herein referred to as Parcel A, and also ordering respondent, CITY OF SAN DIEGO, to set aside the adoption of that portion of the open-space element of its General Plan applicable to the subject property; and

4. For such other and further relief as this Court may deem just and proper.

DATED: August 15, 1974

GORDON PEARCE
C. EDWARD GIBSON
LUCE, FORWARD, HAMILTON & SCRIPPS

By /s/
Louis E. Goebel, Attorneys for
Plaintiff SAN DIEGO GAS &
ELECTRIC COMPANY

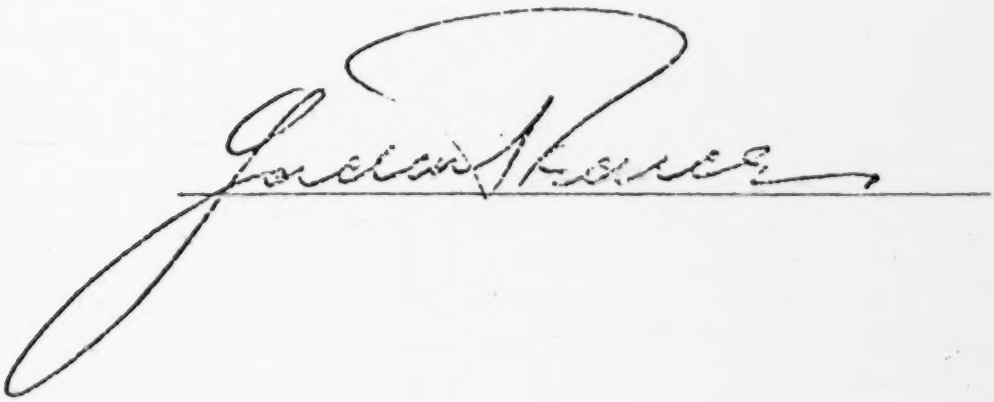
VERIFICATION

I, GORDON PEARCE, declare:

I am an officer, to wit: VICE-PRESIDENT, of San Diego Gas & Electric Company, a corporation, plaintiff in the above-entitled action; I have read the foregoing Complaint for Damages for Inverse Condemnation, and Petitions for Writ of Mandamus and Related Relief and know the contents thereof; I declare that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of August, 1974, at San Diego, California.



PARCEL "A"

All that portion of Pueblo Lot 1339 of the Pueblo Lands of San Diego in the City of San Diego, County of San Diego, State of California, according to the Map thereof made by James Pascoe in 1870, of San Diego County, November 14, 1921, and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "A"; thence from said TRUE POINT OF BEGINNING of Parcel "A" North 46° 30′ 09″ West along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 1955.69 feete to the Northeast corner of said Pueblo Lot 1339; thence North 89° 00′ 29″ West along the Northerly line of said Pueblo Lot 1339, a distance of 917.53 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence South 39° 53′ 12″ East, along said Northeasterly line of the railroad, a distance of 1491.02 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 5654.65 feeet; thence Southeasterly along the arc of said curve through a central angle of 07° 58′ 20″ East, a distance of 102.00 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "A".

Containing 38.74 acres, more or less.

EXHIBIT A

PARCEL "B"

Those certain portions of Pueblo Lots 1339 and 1362 of the Pueblo Lands of San Diego, according to the Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36; being described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "B"; thence from said TRUE POINT OF BEGINNING of Parcel "B" South 46° 30′ 09″ East along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence South 01° 04′ 56″ East, a distance of 56.57 feet; thence South 50° 16′ 35″ East, a distance of 251.96 feet; thence South 38° 42′ 00″ East, a distance of 393.64 feet to a point of intersection with the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence South 75° 33′ 21″ West along said Southerly line of the Northerly 50 acres of said Pueblo Lot 1362, a distance of 968.66 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1545.93 feet to a point of intersection with the Westerly line of said Pueblo Lot 1362; thence North 14° 23′ 47″ West along said Westerly line, a distance of 104.43 feet to the Southerly line of said Pueblo Lot 1339; thence North 89° 07′ 59″ West along said Southerly line of Pueblo Lot 1339, a distance of 148.48 feet to another point of intersection with the Northeasterly line of the railroad; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1346.01 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "B".

Containing 65.40 acres, more or less.

PARCEL "B-1"

Those portions of Pueblo Lots 1335 and 1362 of the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder for San Diego County November 14, 1921, and is known as Miscellaneous Map No. 36, described as a whole as follows:

Commencing at the Northwest corner of said Pueblo Lot 1335; thence South 0° 55′ 16″ West along the Westerly line of said Pueblo Lot 1335, a distance of 309.84 feet to a point of intersection with the Southwesterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed recorded August 2, 1900 in Book 474 at Page 7 and also by Deed dated April 21, 1909, recorded in Book 461 at Page 372, both of Deeds, Records of said County of San Diego, said point of intersection being the TRUE POINT OF BEGINNING of the property herein described in Parcel "B-1" thence from said TRUE POINT OF BEGINNING of Parcel "B-1" continuing South 0° 55′ 16″ West along the Westerly line of said Pueblo Lot 1335, a distance of 1112.10 feet; thence leaving said Westerly line of Pueblo Lot 1335 North 37° 34′ 47″ East, a distance of 495.28 feet; thence South 44° 05′ 16″ East, a distance of 46.27 feet to a point of intersection with the common boundary line between said Pueblo Lots 1335 and 1362; thence South 15° 28′ 47″ East along said common boundary line, a distance of 415.56 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence North 75° 33′ 21″ East along said Southerly line of the Northerly 50 acres, a distance of 631.60 feet to another point of intersection with the Southwesterly line of the railroad; thence North 45° 58′ 20″ West along said Southwesterly line of the railroad, a distance of 1435.18 feet to the TRUE POINT OF BEGINNING of Parcel "B'1".

POINT OF BEGINNING of Parcel "B-1".

Containing 12.24 acres, more or less.

PARCEL "C"

Those certain portions of Lots 4, 5, 6, 7 and the Southeast Quarter of the Northeast Quarter of Section 25, Township 14 South, Range 4 West, together with that portion of Lot 4 of Section 30, Township 14 South, Range 3 West, all within the San Bernardino Base and Meridian in the City of San Diego, County of San Diego, State of California, according to the Official Plat thereof described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "C" thence from said TRUE POINT OF BEGINNING of Parcel "C" South 46° 30′ 09″ East along the common boundary line between said Sections 25 and 30 and the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence North 01° 04′ 56″ West, a distance of 286.32 feet; thence North 46° 25′ 56″ West, a distance of 189.19 feet; thence North 22° 39′ 32″ West, a distance of 214.89 feet; thence North 15° 42′ 27″ West, a distance of 472.39 feet; thence North 13° 49′ 04″ West, a distance of 392.47 feet; thence North 18° 31′ 25″ East, a distance of 90.14 feet; thence North 15° 10′ 00″ West, a distance of 273.57 feet; thence North 16° 30′ 35″ West, a distance of 168.81 feet; thence South 89° 30′ 06″ West, a distance of 333.41 feet; thence North 42° 10′ 06″ West, a distance of 16.27 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Northwesterly and Northerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence tangent to said curve North 16° 58′ 24″ East, a distance of 59.49 feet; thence South 87° 42′ 06″ East, a distance of 113.42 feet; thence South 80° 56′ 06″ East, a distance of 88.94 feet to the beginning of a tangent curve concave Northerly, having a radius of 270.00 feet; thence Easterly along the arc of said curve through a central angle of 17° 28′ 41″ a distance of 82.36 feet to a point therein; a radial of said curve passing through last said

point bears South 08° 24′ 47″ East; thence from last said point North 14° 39′ 43″ West, a distance of 252.83 feet; thence North 27° 31′ 06″ West, a distance of 104.53 feet; thence South 76° 36′ 25″ West, a distance of 95.67 feet; thence North 10° 51′ 04″ West, a distance of 153.85 feet; thence North 05° 00′ 03″ West, a distance of 136.54 feet; thence South 65° 44′ 51″ West, a distance of 923.00 feet; thence South 24° 15′ 09″ East, a distance of 670.00 feet; thence South 65° 44′ 51″ West, a distance of 472.00 feet to the TRUE POINT OF BEGINNING of Parcel "C".

Containing 49.52 acres, more or less.

BEFORE THE CITY OF SAN DIEGO

IN THE MATTER OF THE CLAIM OF SAN DIEGO GAS & ELECTRIC COMPANY,

Claimant.

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SAN DIEGO, CALIF.

Pursuant to Section 910 of the California Government Code, SAN DIEGO GAS AND ELECTRIC COMPANY, a California corporation, through its counsel, hereby claims against the CITY OF SAN DIEGO in the sum of $6,150,000, and in support of this claim states as follows:

I

The damages and injuries which are the subject of this claim occurred on or about June 7, 1973, and June 19, 1973, at San Diego, California and have continued thereafter. This claim involves three parcels of real property located in the City of San Diego in an area commonly known as the Sorrento Valley, immediately adjacent to the Sorrento Valley Industrial Park complex. The first parcel is described on Exhibit "A" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel A". The second parcel is described on Exhibit "B" attached hereto and incorporated herein as though fully set forth,, and said parcel shall hereinafter be referred to as "Parcel B". The third parcel is described on Exhibit "C" attached hereto and incorporated herein as though fully set forth, and said parcel shall hereinafter be referred to as "Parcel C".

II

The damages and injuries occurred in the following manner:

Parcels A, B and C were originally acquired by claimant, San Diego Gas & Electric Company, in 1966. At that time, there was discussions

between the claimant and authorized representatives of the City of San Diego with regard to the suitability of the property for use by claimant for development and expansion of its operating facilities, and, in fact, some 25 acres, a portion of Parcel C, were purchased directly from the City of San Diego for the express purpose of forming a part of an assemblage being acquired by claimant for such purposes.

In 1972, the San Diego City Council directed the Planning Commission to initiate public hearings upon the re-zoning of the property which is the subject of this claim to A-1-10 or "any other appropriate zone". Claimant is informed and believes that concurrently therewith and continuing thereafter, the City through its Planning Department and its Community Development Department, engaged in activities which were planned, coordinated, and implemented with the conscious design and intent to deprive claimant of any practical, beneficial or economical use of the property and, in fact, to take claimant's property for public use without compensation or to reduce dramatically the amount of the award which would have had to be paid if the City subsequently acquired the property by exercise of its power of eminent domain.

The actions taken by the City and its departments and agencies in furtherance of said design and intent include, but are not limited to, the following. The Planning Department prepared a plan entitled, "A Plan for the Preservation of Natural Parks for San Diego," the open space element to the City's General Plan, and held public hearings thereon. A noticed public hearing was held on May 16, 1973, to consider a plan which designated Parcel A and a portion of Parcel C as open space. The hearing was continued to May 23, 1973, for determination. Claimant is informed and believes that prior to the May 23, 1973 hearing, the Planning Department, in consultation with the Community Development Department, without notice to the public or to the claimant, revised the plan under consideration to include Parcel B and additional portions of Parcel C. A plan in the latter form was adopted on May 23, 1973, and sent to the City Council for action.

Claimant is informed and believes that concurrently therewith and in consultation with the Planning Department, the Community Development Department was preparing plans for acquisition by purchase of land by the City for open space. The Community Development Department prepared and distributed a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973" which contained a map earmarking Parcels A, B and C for acquisition as open space. Said report further contained a proposal for funding of said purchase by bonds, and specifically allocated funds to be used for the purchase of claimant's property. Said report was presented to the City Council meeting in conference on May 30, 1973. Subsequently, the report was adopted by the Council and the bond proposal placed upon the September 18, 1973, ballot as Proposition B.

On April 11, 1973, the Planning Commission down-zoned Parcel A from M-1A to A-1-10, but voted to retain the existing M-1A zoning on Parcel B, and voted to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A zoning upon presentation of a specific development plan.

On June 7, 1973, the City Council adopted the recommendation of the Planning Commission and down-zoned Parcel A from M-1A to A-1-10, while voting to retain the existing M-1A zoning on Parcel B, and voting to retain the existing A-1-1 zoning on Parcel C, with the recommendation that Parcel C be considered for M-1A upon presentation of a specific development plan, all despite the fact that all of the subject property was designated for industrial use on the City of San Diego General Plan 1990, adopted by the City Council on January 27, 1972.

On June 19, 1973, the City Council accepted the recommendation of the Planning Commission and adopted the open space plan described in the report entitled, "A Plan for the Preservation of Natural Parks for San Diego", thereby completing the implementation of the aforesaid design by resolution or ordinance and depriving claimant of any practical, beneficial or economical use of the subject property.

III

On numerous occasions claimant has expressed to various officials acting on behalf of the City of San Diego its position that the foregoing acts on the part of the City constituted a wrongful taking and/or damaging of claimant's property, since those actions effectively deprived claimant of any possible beneficial or economical use of claimant's property without compensation.

IV

The names of the City agencies causing the aforesaid damage, to the best of claimant's knowledge at this time, are the Planning Department, the Community Development Department, the Planning Commission, and the City Council, and the members, agents and employees thereof.

V

The basis of computation of the amount claimed is based upon the fair market value of Parcels A, B, and C at the time of taking as set forth hereinabove.

VI

Claimant's counsel is aware of persons having knowledge of the circumstances surrounding the claim, as well as documents setting forth the facts, and would be pleased to meet with representatives of the City to discuss, in further detail, the facts, the persons involved, and the documents available.

VII

This claim is made and instituted, *inter alia*, on the basis of the provisions set forth in California Code of Civil Procedure §1243.1 and the United States and California Constitutions.

VIII

Notice is hereby given that claims for any and all costs and expenses incurred in conducting this claim or subsequent litigation, including, but not limited to, costs of suit, costs of expert witnesses, costs of expert consultant witnesses and attorneys' fees will also be presented, all in amounts to be determined as the case progresses.

IX

The post office address of the claimant is as follows:

San Diego Gas & Electric Company
Engineering Land Department
Post Office Box 1831
San Diego, California, 92112

The post office address of claimant's counsel to which all notices concerning this claim should be sent is:

Louis E. Goebel, Esq.
Luce, Forward, Hamilton & Scripps
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California, 92101

DATED: 6/6/74

GORDON PEARCE
C. EDWARD GIBSON
LUCE, FORWARD,
HAMILTON & SCRIPPS

By: LOUIS E. GOEBEL
Louis E. Goebel, Attorneys
for Claimant

PARCEL "A"

All that portion of Pueblo Lot 1339 of the Pueblo Lands of San Diego in the City of San Diego, County of San Diego, State of California, according to the Map thereof made by James Pascoe in 1870, of San Diego County, November 14, 1921, and is known as Miscellaneous Map No. 36, described as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "A"; thence from said TRUE POINT OF BEGINNING of Parcel "A" North 46° 30' 09" West along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 1955.69 feete to the Northeast corner of said Pueblo Lot 1339; thence North 89° 00' 29" West along the Northerly line of said Pueblo Lot 1339, a distance of 917.53 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence South 39° 53' 12" East, along said Northeasterly line of the railroad, a distance of 1491.02 feet to the beginning of a tangent curve concave Northeasterly and having a radius of 5654.65 feeet; thence Southeasterly along the arc of said curve through a central angle of 07° 58' 20" East, a distance of 102.00 feet; thence leaving said Northeasterly line of the railroad North 65° 44' 51" East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "A".

Containing 38.74 acres, more or less.

EXHIBIT A

PARCEL "B"

Those certain portions of Pueblo Lots 1339 and 1362 of the Pueblo Lands of San Diego, according to the Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36; being described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "B"; thence from said TRUE POINT OF BEGINNING of Parcel "B" South 46° 30′ 09″ East along the common boundary line between said Pueblo Lands of San Diego and Section 25, Township 14 South, Range 4 West, San Bernardino Base and Meridian, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence South 01° 04′ 56″ East, a distance of 56.57 feet; thence South 50° 16′ 35″ East, a distance of 251.96 feet; thence South 38° 42′ 00″ East, a distance of 393.64 feet to a point of intersection with the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence South 75° 33′ 21″ West along said Southerly line of the Northerly 50 acres of said Pueblo Lot 1362, a distance of 968.66 feet to a point of intersection with the Northeasterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed dated April 21, 1909, recorded in Book 461 at Page 372 of Deeds, Records of said County of San Diego; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1545.93 feet to a point of intersection with the Westerly line of said Pueblo Lot 1362; thence North 14° 23′ 47″ West along said Westerly line, a distance of 104.43 feet to the Southerly line of said Pueblo Lot 1339; thence North 89° 07′ 59″ West along said Southerly line of Pueblo Lot 1339, a distance of 148.48 feet to another point of intersection with the Northeasterly line of the railroad; thence North 45° 58′ 20″ West along said Northeasterly line of the railroad, a distance of 1346.01 feet; thence leaving said Northeasterly line of the railroad North 65° 44′ 51″ East, a distance of 937.97 feet to the TRUE POINT OF BEGINNING of Parcel "B".

Containing 65.40 acres, more or less.

PARCEL "B-1"

Those portions of Pueblo Lots 1335 and 1362 of the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder for San Diego County November 14, 1921, and is known as Miscellaneous Map No. 36, described as a whole as follows:

Commencing at the Northwest corner of said Pueblo Lot 1335; thence South 0° 55' 16" West along the Westerly line of said Pueblo Lot 1335, a distance of 309.84 feet to a point of intersection with the Southwesterly line of the 150.00 foot-wide right of way conveyed to the Atchison, Topeka & Santa Fe Railway Company, a corporation, by Deed recorded August 2, 1900 in Book 474 at Page 7 and also by Deed dated April 21, 1909, recorded in Book 461 at Page 372, both of Deeds, Records of said County of San Diego, said point of intersection being the TRUE POINT OF BEGINNING of the property herein described in Parcel "B-1" thence from said TRUE POINT OF BEGINNING of Parcel "B-1" continuing South 0° 55' 16" West along the Westerly line of said Pueblo Lot 1335, a distance of 1112.10 feet; thence leaving said Westerly line of Pueblo Lot 1335 North 37° 34' 47" East, a distance of 495.28 feet; thence South 44° 05' 16" East, a distance of 46.27 feet to a point of intersection with the common boundary line between said Pueblo Lots 1335 and 1362; thence South 15° 28' 47" East along said common boundary line, a distance of 415.56 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence North 75° 33' 21" East along said Southerly line of the Northerly 50 acres, a distance of 631.60 feet to another point of intersection with the Southwesterly line of the railroad; thence North 45° 58' 20" West along said Southwesterly line of the railroad, a distance of 1435.18 feet to the TRUE POINT OF BEGINNING of Parcel "B'1".

POINT OF BEGINNING of Parcel "B-1".

Containing 12.24 acres, more or less.

PARCEL "C"

Those certain portions of Lots 4, 5, 6, 7 and the Southeast Quarter of the Northeast Quarter of Section 25, Township 14 South, Range 4 West, together with that portion of Lot 4 of Section 30, Township 14 South, Range 3 West, all within the San Bernardino Base and Meridian in the City of San Diego, County of San Diego, State of California, according to the Official Plat thereof described as a whole as follows:

Beginning at the TRUE POINT OF BEGINNING described above in Parcel "D" said point is herein declared to be the TRUE POINT OF BEGINNING of the property herein described in Parcel "C" thence from said TRUE POINT OF BEGINNING of Parcel "C" South 46° 30′ 09″ East along the common boundary line between said Sections 25 and 30 and the Pueblo Lands of San Diego, according to Map thereof made by James Pascoe in 1870, a copy of which said Map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, said line is known as the Northeasterly line of the Pueblo Lands of San Diego and is shown on City of San Diego Engineer's Drawing No.'s 5261-L to 5268-L, known as the Williams line, a distance of 2633.79 feet; thence North 01° 04′ 56″ West, a distance of 286.32 feet; thence North 46° 25′ 56″ West, a distance of 189.19 feet; thence North 22° 39′ 32″ West, a distance of 214.89 feet; thence North 15° 42′ 27″ West, a distance of 472.39 feet; thence North 13° 49′ 04″ West, a distance of 392.47 feet; thence North 18° 31′ 25″ East, a distance of 90.14 feet; thence North 15° 10′ 00″ West, a distance of 273.57 feet; thence North 16° 30′ 35″ West, a distance of 168.81 feet; thence South 89° 30′ 06″ West, a distance of 333.41 feet; thence North 42° 10′ 06″ West, a distance of 16.27 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Northwesterly and Northerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence tangent to said curve North 16° 58′ 24″ East, a distance of 59.49 feet; thence South 87° 42′ 06″ East, a distance of 113.42 feet; thence South 80° 56′ 06″ East, a distance of 88.94 feet to the beginning of a tangent curve concave Northerly, having a radius of 270.00 feet; thence Easterly along the arc of said curve through a central angle of 17° 28′ 41″ a distance of 82.36 feet to a point therein; a radial of said curve passing through last said

point bears South 08° 24′ 47″ East; thence from last said point North 14° 39′ 43″ West, a distance of 252.83 feet; thence North 27° 31′ 06″ West, a distance of 104.53 feet; thence South 76° 36′ 25″ West, a distance of 95.67 feet; thence North 10° 51′ 04″ West, a distance of 153.85 feet; thence North 05° 00′ 03″ West, a distance of 136.54 feet; thence South 65° 44′ 51″ West, a distance of 923.00 feet; thence South 24° 15′ 09″ East, a distance of 670.00 feet; thence South 65° 44′ 51″ West, a distance of 472.00 feet to the TRUE POINT OF BEGINNING of Parcel "C".

Containing 49.52 acres, more or less.

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JOHN W. WITT
CITY ATTORNEY

August 5, 1974

Luce, Forward, Hamilton & Scripps
1700 Bank of California Plaza
110 West A Street
San Diego, CA 92101

Attention: Louis E. Goebel, Esq.

Gentlemen:

Claim of San Diego Gas & Electric Company filed
on June 6, 1974

Your claim, which was filed some time ago against The City of San Diego, was referred to this office for investigation and a determination of legal liability.

As you may know, the liability of a municipality to persons who claim damages is strictly limited by the Acts of the Legislature of the State of California governing municipal operations.

Because subsequent investigation and legal opinion determined that your claim cannot be honored, and because no formal denial has been caused to be issued by The City of San Diego within the 45-day time period as prescribed in California Government Code, Section 912.3, your claim is deemed denied by operation of that law.

This letter is to advise you of the denial of your claim and to inform you that in the event you desire to pursue this matter further, that you must do so in compliance with the time limits set forth in Government Code, Section 945.6.

Sincerely yours,

JOHN W. WITT, City Attorney

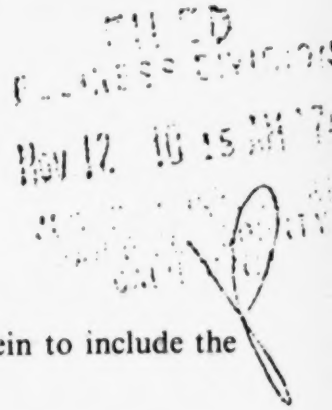
By /s/
Ronald L. Johnson
Chief Deputy

EXHIBIT E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 AMENDMENT TO COMPLAINT [DECLARATORY RELIEF]



Plaintiff hereby amends its Complaint on file herein to include the following cause of action. Plaintiff alleges:

FOURTH CAUSE OF ACTION

[Declaratory Relief, C.C.P. §1060]

I

Plaintiff repeats and realleges each, every and all of the allegations contained in Paragraphs I through XVI, inclusive, of Plaintiff's First Cause of Action, and incorporates the same herein as though fully set forth.

II

The ordinances purportedly adopted by the defendant, CITY OF SAN DIEGO, were invalid and unconstitutional and byond the power of said defendant in that:

a. Said ordinances were adopted without notice to plaintiff as required by the Constitution of the United States of American and California, causing substantial prejudice to plaintiff;

b. Said ordinances were arbitrary, capricious, oppressive, unreasonable and an unreasonable exercise of the purported police power of the City of San Diego.

III

A controversy has arisen between plaintiff and defendants, and each of them, in that plaintiff claims the ordinances adopted by defendant CITY OF SAN DIEGO are unconstitutional and void and defendants claim said ordinances are valid and enforceable against the plaintiff.

IV

Plaintiff desires and requires a judicial determination of its rights and duties in the circumstances, and a declaration of the Court that the ordinances adopting the proposed open space element to the City's General Plan and the ordinance down-zoning that portion of the subject property herein referred to as parcel A are void and unconstitutional.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows:

1. For a declaration of this Court that the ordinance down-zoning that portion of the subject property herein referred to as parcel A is unconstitutional and void.

2. For a declaration of this Court that the ordinance adopting that portion of the open-space element of San Diego's General Plan applicable to the subject property is unconstitutional and void.

3. For an injunction permanently enjoining the defendants and any officer or agent of any of them, from attempting to enforce said

3. For an injunction permanently enjoining the defendants and any officer or agent of any of them, from attempting to enforce said ordinances against plaintiff.

4. For such other and further relief as the Court may deem proper.

DATED: November 8, 1974

Gordon Pearce
C. Edward Gibson
LUCE, FORWARD, HAMILTON
& SCRIPPS

By /s/
Louis E. Goebel, Attorneys
for Plaintiff SAN DIEGO GAS
& ELECTRIC COMPANY

FILED
Robert D. Zumwalt, Clerk
APR 9 1976
BY S. KENDALL, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	NO. 357022 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on January 19, 1976, in Department 26 of the above-entitled Court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff, San Diego Gas & Electric Company, and C. Alan Sumption appeared as counsel for defendant, City of San Diego, a municipal corporation.

The matter having been previously bifurcated to require trial of the question of liability first and a jury having been demanded by plaintiff, the Court heard argument and received briefs on the question of entitlement of plaintiff to a jury in the liability phase of the trial. The matter was submitted to the Court for decision, and the Court determined that the plaintiff was not entitled to a jury in the liability phase, but was entitled to a jury for the damage phase.

The liability phase proceeded without a jury. Witnesses were sworn and evidence, both oral and documentary, was introduced. The evidence in the liability phase being closed, and the question of liability having been submitted to the Court for decision, and, after deliberation thereon, the Court now renders its decision in writing and makes the following Findings of Fact and Conclusions of Law on the question of liability:

FINDINGS OF FACT

1. Plaintiff San Diego Gas & Electric Company is a corporation with its principal place of business in San Diego County, California, and is the legal owner of the real property which is the subject of this action.

2. The defendant City of San Diego is a municipal corporation possessing the power of eminent domain.

3. In April of 1966, plaintiff acquired approximately 412 acres of property in the Sorrento Valley area of the City of San Diego as an assemblage after extensive negotiation. The portion of this property located south of Carmel Valley Road and west of Interstate 5 is the subject of this action and is the property acquired by plaintiff in April of 1966, except that portion east of Sorrento Valley Road and the 12 acres west of the railroad right of way and which is graphically described in Exhibit "A", attached hereto and made a part hereof by this reference.

4. Approximately 25 acres of the subject property was acquired from the defendant City at fair market value of approximately $5,200 per acre.

5. The northwesterly portion of the subject property is subject to tidal action from the Pacific Ocean and is sometimes referred to as the

Los Penasquitos Lagoon. A great portion of the subject property is not subject to tidal action nor salt water intrusion, although it is subject to fresh water ponding in the wet season. There exists only sparse vegetation on the property. It is presently and has been since 1966 vacant except for some utility lines which traverse it.

6. In 1966, approximately 116 acres of the subject property was zoned M-1-A (industrial), and most of the balance was zoned A-1-1 (agricultural holding).

7. The General Plan of the City of San Diego, first adopted in 1967, designated almost all of the subject property for industrial use, and this designation has been reaffirmed consistently with the last readoption in January of 1972.

8. In 1966, considerable industrial development had taken place in the Sorrento Valley area immediately to the southeast of the subject property, and this development continued apace through 1973 and to the present so that the industrial development is substantially filled out up to the subject property.

9. In the late 1960's, a proposed plan of lands in the City which might be acquired for open space was prepared by the Planning Department of the defendant City, and a portion of the subject property was included therein.

10. On March 16, 1972, a conference meeting of the San Diego City Council was held on the subject of open space. Particular reference was made to the acquisition of open space and a bond issue was discussed. A motion was passed directing the Planning Director and the City Attorney to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

11. In July of 1972, the City Council held another conference on the subject of open space and specifically discussed an open space bond issue for the November, 1972, election.

12. On August 10, 1972, the City Council of the defendant City initiated a rezoning of the subject property from M-1-A to A-1-10, or other appropriate zone.

13. The open space bond issue on the November, 1972, ballot failed.

14. In late 1972 or very early in 1973, the Planning Department of the defendant City commenced preparing an open space element to the City's General Plan as required to be adopted by State law by June 30, 1973. The draft open space element designated a portion of the subject property which was then zoned M-1-A as open space for public acquisition.

15. At the same time, the Community Development Department of the defendant City was carrying out detailed planning for the funding of open space acquisition, and specific estimated costs of acquisition of specific properties were being estimated. This effort was in preparation for another open space bond issue scheduled for the September, 1973, municipal election. One estimate reported was the acquisition of 120 acres of the subject property for a cost of $900,000.00.

16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and

newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

17. On April 11, 1973, the Planning Commission of the defendant City held a public hearing on the proposed rezoning of the subject property, and the Planning Commission recommended down-zoning of a portion of the subject property, approximately 39 acres, from M-1-A to A-1-10, but recommended that a substantial portion, approximately 77 acres, remain M-1-A, and that a further segment, approximately 50 acres, remain A-1-1, but be considered for future industrial use on submission of a specific plan for development.

18. On May 16, 1973, the Planning Commission of the defendant City held its first public hearing on the new open space element to the City's General Plan which was entitled, "A Plan for the Preservation of Natural Parks for San Diego". Plaintiff and others had only received the proposed plan less than 24 hours before the hearing, and, accordingly, a continuance was requested and ultimately granted to May 23, 1973. The plan as submitted proposed to designate only the northerly portion of the subject property as open space.

19. At the May 16, 1973, hearing, M. David Smith of the Planning Department, and James McLaughlin of the Community Development Department, compared notes and determined that the plan proposed by the Planning Department did not conform to the plans being developed in the Community Development Department for use in conjunction with the bond issue. Mr. Smith had been previously instructed by his superiors to conform the Planning Department's open space efforts to those of the Community Development Department. Accordingly, Mr. Smith directed his associate, Mr. Stang, to coordinate with the Community Development Department and to make the open space element designations conform to those of the Community Development Department for acquisition by bond issue.

Mr. Stang did so and revised the large wall exhibit maps which were on display at the Planning Commission hearing. The effect of the revision as to the subject property was to include all of the subject property except that east of Sorrento Valley Road and the 12 acres west of the railroad right of way. However, there was not sufficient time before the next hearing to reprint the maps contained in each report which had been submitted to the Planning Commission and to the public. Accordingly, they were left in their existing form.

20. On May 23, 1973, the continued hearing on the open space element was held before the Planning Commission. No mention was made on the public record that the wall exhibits had been altered, and plaintiff was totally unaware that the change had been made and of its impact with respect to the subject property. The open space element was adopted by the Planning Commission in the form presented.

21. On May 30, 1973, the City Council of the defendant City held another Council conference and received the report from the Community Development Department regarding the bond issue. The efforts of the Community Development Department had culminated in a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973". This report discussed the means of funding acquisition of property for open space and specifically designated substantially all of the subject property for acquisition as open space.

22. On June 7, 1973, the City Council of the defendant City accepted the recommendation of the Planning Commission and thereafter rezoned a portion of the subject property from M-1-A to A-1-10, while retaining a substantial portion in the M-1-A zone and further retaining a portion of the A-1-1 zone with a recommendation for consideration for future industrial upon submission of a specific plan for development.

23. On June 19, 1973, the City Council of the defendant City held a public hearing for adoption of the open space element to the City's General Plan. Again, individual revised maps were not prepared nor distributed. Rather, the corrected wall exhibits were displayed. The copies of the open space element which each member of the City Council and members of the public held contained the erroneous map designation. No mention of this discrepancy was made on the public record, and the open space element was adopted as presented.

24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized.

25. The September 18, 1973, bond issue failed.

26. Following the September, 1973, election, the defendant City deleted the subject property from its priority list of proposed open space acquisitions.

27. In the condition that existed prior to June of 1973, the highest and best use of the property taken was for use as an industrial park and related buffer areas.

28. In the aforesaid condition, before the actions of the defendant City in June of 1973, the property had a substantial fair market value.

29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has

further suffered severance damage with respect to the balance of the subject property.

30. No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space.

31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space.

32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property.

33. Since the actions of the defendant City in June of 1973, the property designated as open space and the remainder of the larger parcel is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value.

CONCLUSIONS OF LAW

1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just

compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property.

2. Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property designated as open space on June 19, 1973, considered without regard to the open space designation, together with damages to the remainder parcel or parcels, together with plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees actually incurred.

TRIAL

The trial of the damage phase of this action before a jury is hereby set for May 3, 1976, at 10:00 a.m., in Department 26, San Diego County Superior Court.

DATED: APR 9 1976.

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

LAW OFFICES
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 THE BANK OF CALIFORNIA PLAZA
110 WEST A STREET
SAN DIEGO, CALIFORNIA 92101
(714) 236-1414

FILED
Robert D. Zumwalt, Clerk
OCT 8 1976
BY J. KENDALL, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 JUDGMENT IN INVERSE CONDEMNATION

This cause came on regularly to trial on January 19, 1976, in Department 26 of the above-entitled court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff SAN DIEGO GAS & ELECTRIC COMPANY, and C. Alan Sumption appeared as counsel for defendant CITY OF SAN DIEGO, a municipal corporation.

The matter had been previously bifurcated to require the question of liability to be tried to the court and the issue of just compensation being thereafter determined by the jury.

Findings of Fact and Conclusions of Law were executed and filed herein which provided, *inter alia*, that the activities of defendant CITY with respect to plaintiff's property constituted a taking of that portion of plaintiff's property described on Exhibit A attached hereto and made a part hereof by this reference, and that plaintiff was entitled to damages in the amount of the fair market value of the property taken as of June 19, 1973, and damages to the remaining lands of plaintiff.

The court having instructed the jury as to the law of the case, submitted to the jury a form of verdict and instructed the jury to ascertain and assess the fair market value of the subject property as of June 19, 1973, as their verdict in said cause. The jury retired and did consider said matter and thereafter returned into court for their verdict in said action and returned said form of verdict so submitted to them, which verdict was as follows:

> "We, the jury in the above-entitled action, find that,
>
> 1. The fair market value of the property taken is $2,886,300.00.
>
> 2. The severance damages to the remainder of plaintiff's property after acquisition are $283,696.00."

Said verdict was then and there, on May 20, 1976, duly entered and filed, and the court having made its Findings of Fact and Conclusions of Law as to all other matters, questions and issues involved in the proceeding;

And it further appearing to the court that the use to which the property was taken and is to be applied is a use authorized by law, and that the taking of the same is necessary to such use; and that the taking of the property occurred on June 19, 1973;

NOW, THEREFORE, by reason of the law in the premises and the evidence of the verdict aforesaid,

IT IS HEREBY ORDERED AND ADJUDGED that the value of plaintiff's real property taken by defendant, as fixed by the jury, was on June 19, 1973, the sum of $2,886,300.00, together with damages to the remainder of plaintiff's property, after severing from said property the part taken, in the amount of $283,696.00, for the total amount of $3,169,996.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover interest on said amount of $3,169,996.00 at the legal rate of seven percent (7%) per annum from and after June 19, 1973 to the date of entry of judgment;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover its appraisal fees in the amount of $41,094.53; its engineering fees in the amount of $41,779.54; and its attorneys' fees in the amount of $39,685.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover its costs of suit herein;

IT IS FURTHER ORDERED AND ADJUDGED that payment to the court of the sum of money specified above is in full payment for the real property so taken, and for damage to the remaining lands of plaintiff suffered by reason of the taking of the property;

IT IS FURTHER ORDERED AND ADJUDGED that the real property taken is described more particularly on Exhibit A attached hereto and incorporated herein by this reference.

DATED: OCT 8 1976

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

SAN DIEGO GAS & ELECTRIC COM
PANY, Plaintiff and Respondent,

v.

CITY OF SAN DIEGO et al.,
Defendants and Appellants.

Civ. 16277.

Court of Appeal, Fourth District,
Division 1.

May 17, 1978.

As Modified on Denial of Rehearing
June 13, 1978.

Hearing Granted July 13, 1978.

Electric utility sued city in inverse condemnation to recover value of property allegedly taken because down zoning combined with inclusion of tract in open space element of general plan made it impossible to use the land. The Superior Court, San Diego County, Jack R. Levitt, J., rendered judgment for the utility, and the city appealed. The Court of Appeal, Gerald Brown, P.J., held that: (1) subject to exceptions, general rule is that a rezoning which merely reduces market value does not give rise to a cause of action in inverse condemnation; (2) although charter city, which did not adopt implementing ordinances, was not bound by statute requiring zoning to be consistent with general plan, city's policy of "consistency" could be considered; (3) where combination of down zoning plus inclusion of property in open space element, plus "consistency" policy and city's overtures to purchase the property for open space deprived owner of beneficial use thereof, in that because of location and peculiar characteristics of the land it was suitable only for industrial use, which city would not permit, and had no beneficial or economic use except as open space, a compensable taking had occurred; (4) failure to apply for conditional use permit did not bar relief on theory of failure to exhaust administrative remedies since owner was not seeking to develop the land, and (5) award of prejudgment interest was not error.

Affirmed.

GERALD BROWN, Presiding Justice.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking,

June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, down-zoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone retained its industrial classification.[1] On June 19, 1973 City adopted the open space element of the General Plan which covered all the land found condemned here, about 233 acres. In September 1973, the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations

1. From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
" holding zone	

After the rezoning, the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
" holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

combined with the open space element of the general plan has made the property useless. Substantial evidence, introduced during trial, supports the Company's position.

[1] The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719, 123 P.2d 505). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

[2] In some instances the state will appropriate a person's property without paying for it in advance. This may occur in a variety of situations. The government may deliberately destroy private property in the public interest such as when it demolishes buildings to prevent the spread of fire; it may inadvertently damage property in the construction of public improvements; it may decrease the value of a person's property, for example, by constructing a freeway which cuts down light and air to a particular property; or it may decrease the value of a person's property by regulations which limit the use or development of the property. (10 Cal.Law Rev. Commission Reports, Recommendations and Studies, 1970-1971 at pp. 79-81.) In these instances the state is said to have acquired the property through inverse condemnation and the property owner can bring suit to recover the compensation due him.

[3-8] The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530, 20 Cal.Rptr. 638, 370 P.2d 342). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 514, 125 Cal.Rptr. 365, 542 P.2d 237). However, there are exceptions to the rule. For example, the state may abuse its use of the police power by placing unreasonable or arbitrary regulations on land under the guise of zoning (*Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 326, 131 Cal.Rptr. 633). A regulation may be unreasonable if it deprives the landowner of any beneficial use of his property (*Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 624, 129 Cal.Rptr. 575) or if it deprives the owner of his property so it can be used by the public (*Sneed v. County of Riverside,* 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Likewise, if the state down-zones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation. Or, if zoning classifications are used to evade the requirement that land used by the public must be acquired by the public, such zoning is condemnation (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 516, fn. 14, 520, 125 Cal.Rptr. 365, 542 P.2d 237). The question whether a particular zoning restriction results in a

taking by inverse condemnation is "a question of fact to be determined by trial of the issue." (*Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628, 129 Cal.Rptr. 575, 584.) On review, the appellate court looks for substantial evidence to support the finding below (*Foreman & Clark Corp. v. Fallon,* 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362).

[9-11] When the government restricts a landowner's use of his property, it is important to determine whether it is doing so under the police power or under the power of eminent domain because this is what governs the question of compensation. However, there is no set formula to distinguish a regulation from a taking or to draw the line where regulation ends and taking begins. Cases which involve the appropriation of land by the state or use of the land by the public clearly demand the state to take title and pay for the taking; cases where the landowner is prohibited from noxious use of his land, for example as a gravel pit,[2] no compensation is due even though the landowner may be effectively prevented from all use of his land. From another point of view, where the government acts in its enterprise capacity, acquiring assets from the citizenry for its own account, as it were, then payment must be made; where the government mediates disputes among competing alternatives, such as prohibiting pigs in the backyard, it is merely regulating the private interests in the community. One commentator has suggested that the compensation clause in the Constitution never was meant to preserve the economic status quo; rather, it is to serve as a curb on arbitrary government action (Sax, *Takings and the Police Power,* 74 Yale L.J., 36, 37-40, 58, 62-63). However, these guidelines are not always of great help in answering whether a governmental action is a regulation or a taking.

[12] Stripped to its bare essentials, we are asked here whether a person with land zoned for agriculture and manufacturing but lying within the open space area of the general plan can be denied all use of his land and denied compensation. Recognizing that a downzoning, as long as it is reasonable, is not a basis for inverse condemnation, what effect does the general plan have?

[13, 14] Zoning and the general plan are closely interrelated because they both deal with land use, but each performs an essentially different function. Zoning is very precise and legally restricts present land use, while the general plan is merely a planning document which is to serve as a guide to future land use. In California general plans are mandatory (Gov.Code § 65300 et seq.); provision is made for their amendment three times a year (Gov.Code § 65361) which highlights the fact that they are not final documents--neither completed nor inflexible. San Diego's General Plan states in the legend:

> "NOTE: this map presents General Plan land use and circulation policies and proposals in a generalized,

2. *Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515, 518, 20 Cal.Rptr. 638, 370 P.2d 342.

graphic form. It is not a zoning map and should not be so construed."

Notwithstanding the differences in their purpose, scope and function, zoning and the general plan become inextricably linked by the passage of AB 1301 which mandates that zoning be consistent with the general plan (Gov.Code § 65860). At the same time, laws were passed requiring that the issuance of building permits, approval of subdivision maps and adoption of open space zoning be dependent on the proposal being consistent with the local open-space element (Gov.Code § 65567). Depending on the jurisdiction's definition of open space, it would be possible for a parcel within the open space element to be zoned light manufacturing as is the case here and still be consistent with the general plan.[3] However, the issue here should be moot since these provisions requiring consistency do not apply to charter cities such as San Diego unless the City has adopted similar ordinances. This the City has not done (Gov.Code §§ 65700, 65803; *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 108, fn. 5, 127 Cal.Rptr. 520). Thus, here, the general plan should be merely a planning document and should not legally bind the City in making land use decisions.

[15-17] Because the general plan lacks definiteness and finality, there can be no claim in inverse condemnation because land falls within a certain category on an adopted plan (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120, 109 Cal.Rptr. 799, 514 P.2d 111). The mere "planning in anticipation of a public improvement is not a taking" (*Hilltop Properties v. State of California*, 233 Cal.App.2d 349, 356, 43 Cal.Rtpr. 605, 609). Even an announcement that an agency intends to condemn a property results in a taking only when a city does some unequivocal act which shows it is proceeding with a planned improvement (*Hilltop Properties v. State of California, supra*, 233 Cal.App.2d 349, 356, 43 Cal.Rptr. 605). However, even if a bond issue is proposed and certain properties are singled out for purchase if the bond issue passes, this is not a sufficiently unequivocal act to give rise to an action in inverse condemnation (see *City of*

3. The City's definition of open space makes it less than likely a manufacturing zone would be found consistent with open space. On the general plan "open space" is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for The City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

Walnut Creek v. Leadership Housing Systems, 73 Cal.App.3d 641, 622, 140 Cal.Rptr. 690).

[18-20] In summary, the act of downzoning is not compensable unless the regulation is unreasonable or an attempt by the government to lower the value of the land before buying it. Adoption of a general plan does not result in condemnation unless there are additional specific acts which commit the governmental agency to purchase the property. Here there is no legal requirement that the zoning be consistent with the general plan. However, a review of the record shows this was an underlying premise in the court below: expert witnesses testified there must be consistency between zoning and the general plan; counsel for the parties agreed this was the way things were done; City brings to our attention in its briefs the fact it is exempt from the consistency provisions but does not follow through to conclude that the court below made its decision under improper law.[4] As a charter city, San Diego is exempt from the requirements that building permits, subdivision maps and its acquisition and disposal of land be consistent with the open space plan unless the City adopts ordinances to that effect (Gov.Code §§ 65566, 65567, 65700). Even though the City has not adopted the necessary statutes, the City's Planning Department includes these requirements in its publication "A Plan for the Preservation of Natural Parks for San Diego." It appears the City vascillates on this question and thus has the opportunity to deny projects on the basis of inconsistency with the general plan and to deny inverse condemnation because it is not legally bound to have consistency. Although the City weakly protests in its briefs, from the record presented to this court it is clear that even though City may not have been legally bound to have its zoning consistent with its general plan, the City follows this procedure as a matter of policy. The fact that land is within the open space element and its zoning and use are subject to open space constraints, does not constitute inverse condemnation as a matter of law. As noted earlier, the determination there has been inverse condemnation through excessive regulation is a factual matter and we look for substantial evidence to support the finding.

[21, 22] The appellate court presumes the judgment is correct (*Denham v. Superior Court,* 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193) and resolves conflicts in the evidence in support of the judgment (*Nestle v. City of Santa Monica,* 6 Cal.3d 920, 925-926, 101 Cal. Rptr. 568, 496 P.2d 480). Here, the trial court found:

> "Due to the continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage

4. Rather, City somewhat inconsistently argues there was no condemnation here because no zoning classification is inconsistent *per se* with open space.

with respect to the balance of the subject property.

"No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the . . . property, there exists no practical, beneficial or economic use of the . . . property designated as open space which is consistent with open space."

The City has not denied Company a permit to develop the land. Rather Company presented expert witnesses who testified the land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial. But, there was testimony by experts that City required zoning to be consistent with the general plan; the City's definitions of open space (see fn. 3) give rise to the inference that industrial use would not be permitted in the open space area; the City's own expert testified he had never seen an industrial development that would be consistent with oper space although he did not rule out the possibility entirely.[5] The clear inference is that City would deny any application for industrial development on this parcel because of the open space designation on the general plan. In addition, there was expert testimony that after the open space element was adopted, the land had no economic use and no one would buy it. This was substantial evidence to support the court's conclusion there was inverse condemnation.

[23-25] City claims Company is not entitled to relief because it did not try to get a conditional use permit nor did it establish that City would not grant a rezoning or amend the general plan. Both City and its amicus curiae say this as a failure on Company's part to exhaust its administrative remedies, a necessary prelude for the court to acquire jurisdiction (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942). Company here was trying to enjoin City from enforcing the zoning applicable to its property (see *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 268, 148 P.2d 645; *Banville v. County of Los Angeles*, 180 Cal.App.2d 563, 565, 4 Cal.Rptr. 458); or recover damages in inverse condemnation for a taking of its property. (See *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 212, 32 Cal.Rptr. 318.) As to inverse condemnation we know of no administrative agency that handles such suits; this is a matter for the courts. As to these counts, there was no failure to exhaust any administrative remedy since none existed (see *Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 484 P.2d 93). If the ordinance is allegedly

5. City's expert witness testified that a project would not be denied only because it was located within the open space zone and opined that a design for industrial use of the property could be consistent with open space although he concluded "I haven't seen one, but I think that that's possible."

void, then it is necessary to exhaust administrative remedies by seeking a variance or amendment unless it would be futile to do so (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761). The trial court said the facts here were within the exception: the land was to be acquired for open space, had been appraised and had been on the ballot for purchase; the site was included as a park in the City's plan for acquiring parks; the land because of its peculiar characteristics is not suitable for any use, and, thus, any zoning other than industrial. It is inconceivable the City would grant an amendment to the general plan when it had always intended this land would be open space, the very reason it was classified as open space. It is irrelevant whether the City would change the zoning to industrial, the only possible use of the land, in light of the substantial evidence City would not permit industrial development here. It would have been futile to seek administrative review and was unnecessary for Company to exhaust its administrative remedies in this regard.

[26, 27] City says if its acts constitute a taking, Company is not entitled to money damages but only to have the offensive regulations set aside. It contends damages are inappropriate because there has been no actual use of the land by the public and, in essence, Company has not sustained any damage.

The proper remedy depends on what acts of the City are challenged and the findings of the trial court. If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed (*HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 516 fn. 13, 125 Cal.Rptr. 365, 542 P.2d 237); if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief (*Pinheiro v. County of Marin, supra*, 60 Cal.App.3d 323, 326, fn. 2, 131 Cal.Rptr. 633) and the governmental agency is immune from any tort liability (Gov.Code § 818.2; *State of California v. Superior Court (Veta)*, 12 Cal.3d 237, 245-247, 115 Cal.Rptr. 497, 524 P.2d 1281); if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper (see *Eldridge v. City of Palo Alto, supra*, 57 Cal.App.3d 613, 618, 129 Cal.Rptr. 575).

Here Company claimed in one count that the zoning ordinance or the open space element was unconstitutional and void. But it never presented any evidence notice was improper or the ordinance was arbitrary. Rather, the evidence showed and the trial court found that the combination of the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space had deprived it of the beneficial use of its land. The trial court so found. This is an example of inverse condemnation and the landowner should, under the Constitution, be compensated.

[28] City says that if there was a taking and if compensation is due, the trial court erred in awarding interest from the date of the taking rather than from the date of

judgment. Code of Civil Procedure section 1255b, cited by the City, and in effect at the time suit was commenced,[6] provides in part:

"(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

"(1) The date of the entry of judgment.

"(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

"(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession."

However, former section 1255b deals with eminent domain proceedings and is not applicable here (see *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658, fn. 11, 131 Cal.Rptr. 646, 552 P.2d 430).

[29] City says interest should be paid from the time of judgment because no one has interfered with Company's use of the property nor has there been any actual damage to the property. However, in *Holtz* it was the Transit District's removal of lateral support on adjoining property that caused structural damage to improvements on Holtz's land. The Transit District suggested there should be no prejudgment interest because Holtz was not deprived of the use of his property even though repairs were necessary. The Supreme Court responded:

"The contention that an actual taking or dispossession is required in order to justify prejudgment interest in every case lacks merit. The right to prejudgment interest in inverse condemnation accrues *as of the date the compensable taking or injury occurred without regard to the nature or scope of the compensable event.*" (Emphasis ours; *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 657, 131 Cal.Rptr. 646, 653, 552 P.2d 430, 437.)

Here Company's land became the subject of inverse condemnation when the open space element was adopted and, in turn, triggered City's policy of not allowing development of the property. There was no error in awarding prejudgment interest.

[30] City's amicus curiae, the Attorney General, is correct in saying the City's efforts to acquire Company's project by raising the money through a bond issue do not constitute precondemnation blight (see *City of Walnut Creek v. Leadership Housing Systems, supra*, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[31] City claims the trial court erred in allowing severance damages because there was no unity of use and no physical contiguity between the condemned and severed portions. Here the condemned parcel was physically separated by a road from other pieces of the Company's land: one was leased by Company and not

6. Section 1255b of the Code of Civil Procedure was repealed effective July 1, 1976 and its provisions are now contained in Code of Civil Procedure section 1268.310. Under Code of Civil Procedure section 1230.065 section 1255b would be used here.

owned in fee and the jury, in a special finding, did not award any damages due to its severance; the other parcel was suitable for industrial development and was zoned just like the piece across the street. However, the fact the two parcels were separated by a road is immaterial as long as there is access between them and the use of the land taken is not dissimilar to that of the remainder (*City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813). Here there was testimony the area deemed feasible for industrial development included the remainder parcel. There was no error in awarding severance damages.

[32] City argues the trial court erred when it admitted into evidence how much Company had paid for the land originally. Here there was a bifurcated trial with the court determining liability and the jury damages. In order to establish liability, Company had to show that one of its property rights had been invaded and this had directly caused injury (*Selby Realty Co. v. City of San Buenaventura, supra*, 10 Cal.3d 110, 119-129, 109 Cal.Rptr. 799, 514 P.2d 111). City contends correctly the purchase price of the land is irrelevant because a diminution in the value of the land due to a change in zoning does not result in a taking. However, it is relevant to prove the Company suffered injury. This was not error.

[33] City claims the trial court erred in admitting into evidence the testimony of two expert witnesses, each of whom said he would not have advised Company to apply for an industrial development permit because to do so would have been a waste of time and money. However, this testimony was not admitted for the purpose of showing whether City would approve or deny development; rather it was admitted to explain why Company had not tried to get a permit. This was relevant and its admission was not reversible error.

[34-36] City claims the court erred in compelling City Councilman Floyd Morrow to answer hypothetical questions at an oral deposition. The questions related to Morrow's interpretation as an expert witness of "consistency" with the general plan[7] and potential use of the subject property. City is concerned

7. In substance the three questions were:

1) In your opinion as a land use control expert, may a development plan for the subject property be denied by the City of San Diego on the sole ground that the subject property has been designated as open-space for public acquisition in the open-space element of the City's General Plan?

2) In your opinion, pursuant to Government Code § 65567, may a building permit or subdivision map be properly denied for the sole reason that the use contemplated by the permit or map is not consistent with the open-space element of the General Plan of the City?

3) In your opinion, following the City's adoption of the open-space element of the General Plan in June 1973 were there any practical, beneficial or economic uses to which the subject property could have thereafter been devoted? If so, what?

because Mr. Gallagher, an expert appraiser, relied in part on Morrow's deposition in arriving at his conclusion that the highest and best use of the property was public open space. However, City failed at the trial level to preserve this issue for appeal because it did not object to or move to strike Gallagher's testimony insofar as he relied on Morrow's deposition (see *Bardessono v. Michels*, 3 Cal.3d 780, 794, 91 Cal.Rptr. 760, 478 P.2d 480). Notwithstanding City's failure to object, the questions asked were relevant to a determination of the highest and best use of the property. It is proper to discover an expert's opinion through depositions using hypothetical questions (*Dow Chemical Co. v. Superior Court*, 2 Cal.App.3d 1, 10, 82 Cal.Rptr. 288; *Zelayeta v. Pacific Greyhound Lines*, 104 Cal.App.2d 716, 724, 232 P.2d 572). The questions posed to Morrow asked for his opinion as an expert and did not seek to trace his thought processes or motives in passing some particular piece of legislation; the argument this material was not discoverable because of a legislator's privilege is misplaced (*County of Los Angeles v. Superior Court (Burroughs)*, 13 Cal.3d 721, 730-731, 119 Cal.Rptr. 631, 532 P.2d 495). Even if the order compelling answers were improper the resulting prejudice was not sufficient to cause reversible error. The answers in the deposition were only one source of information used by Gallagher in coming to his opinion; he also relied on publications put out by City, opinions of attorneys who were experts in land use matters, his personal experience in appraising other open space property and interviews with potential purchasers and developers. The trial court had the necessary information to be able to assess how much weight to give to Gallagher's testimony.

[37] City complains there is no evidence to support findings 16 and 24 which state:

"16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

"24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized."

City says the land was only a *proposed* park site which would be purchased only *if* the bond issue passed. However, on appeal the court presumes the judgment is correct and views the evidence in the light most favorable to the prevailing party (*Nestle v. City of Santa Monica, supra*, 6 Cal.3d 920, 925-926, 101

Cal.Rptr. 568, 496 P.2d 480). Here, the City's resolution, adopted April 17, 1973, established the need to acquire park reserve areas "to be subsequently identified" as part of a bond issue on the September 1973 ballot. The property here was later identified as a component part of the park reserve system; the property appeared on a map in the San Diego Union as one which was to be acquired under the park bonding issue; it was designated for purchase in the literature given to voters. This supports the findings made by the trial court.

[38] City says there is no evidence to support findings 29 and 32 which read:

"29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damages with respect to the balance of the subject property.

"32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property."

City argues there is no evidence that City would not allow Company to use the land since Company had not applied for and been denied a permit. However, as outlined earlier, Company presented evidence the property was not good for anything except industrial usage; there was an inference from the City's policy of making zoning consistent with the general plan combined with its definitions of open space and the fact it had decided to acquire properties and made overtures as to this land that City would not permit industrial development here; there was expert testimony there was no practical, beneficial or economic use to which the property could be put; there was testimony the best use of the land was public ownership as open space; there was expert testimony the land was not marketable.

[39] City says only about one-half of Company's property that was condemned was rezoned (see fn. 1). However, it was not the rezoning in itself which resulted in the taking. Rather, Company owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the combination of this and other factors, such as zoning, general plan, the "consistency" policy, and the resolution to acquire property which led to the condemnation.

[40] City says Company's witnesses testified only as to the economic feasibility of developing the property; this City claims is merely another version of the diminution of value rule and is not a sufficient basis for inverse condemnation (*Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325, 131 Cal.Rptr. 633). The question asked is whether government regulation has deprived the owner of the beneficial use of its land. Here there was evidence Company could

not develop this land in any way. This is more than just decreasing the value of the land; it is destroying it completely.

[41] City says Company's witnesses contradict themselves when they say it would be futile to seek building approval from the City because none of the experts had that many personal experiences in trying to get permits. However, this goes to the weight of the evidence, a determination made by the fact-finder.

[42] City argues there is no evidence to support finding of fact number 31 which reads:

> "31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space."

There is no evidence of actual physical invasion of the property. However, this is exactly what the City is trying to do by acquiring the property, that is, keep it from being used. The Attorney General in its brief argues for extensive protection of the sensitive estuarine ecosystem from the harmful effects of intrusion. The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being "used" by the public as it has been ever since the date when all the factors coalesced to effect the taking. In addition, there was expert testimony the property had been given over to public use. This was substantial evidence to support the finding.

[43] City challenges the support for and validity of Conclusion of Law #1 which states:

> "1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."

City says there was no evidence here that its acts were not a legitimate exercise of the police power. Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact. As noted earlier there was evidence to support a finding that Company had been deprived of all beneficial use of its land. There was evidence one city councilman had stated the city should preserve as much open space as possible through regulatory measures such as agricultural flood plain zoning to reduce acquisition costs; the City Attorney and the Planning Commission were told to prepare a list of open space areas where the City could proceed with agricultural, flood plain and/or LC (limited control) zoning; the open space maps were changed to include more of Company's land without actual notice to the Company; the City reaffirmed some zoning as industrial and changed some to

future industrial and then two weeks later placed the land in open space. This is substantial evidence to support the trial court's conclusion.

The judgment is affirmed.

COLOGNE and STANIFORTH, JJ., concur.

Rehearing denied; STANIFORTH, J., dissenting.

THE JUDGMENT IN QUESTION

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, reversing the judgment of the trial court, entered on June 26, 1979.

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 26 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022

APPEAL from a judgment of the Superior Court of San Diego County. Jack R. Levitt, Judge. Reversed.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking, June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07. After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon*, 23 Cal.3d 605.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold part of the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, downzoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone

retained its industrial classification.[1] On June 19, 1973, City adopted the open space element of the general plan which covered all of the land found condemned here, about 233 acres. In September 1973 the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations combined with the open space element of the general plan has made the property useless.

The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose

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FOOTNOTE 1: From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
Agricultural holding zone	

After the rezoning the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
Agriculatural [*sic*] holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd, v. Superior Court,* 15 Cal.3d 508, 514). A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611).

Company complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies asserting that City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should Company elect to retry the case.

The judgment is reversed.

Brown
P.J.

WE CONCUR:

Cologne
J.

Stanton
J.

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Excerpts from testimony of **Frank DeVore**
(called as witness by the plaintiff)

. . . .

[2]

Current employment?

San Diego Gas & Electric Company.

What is your job title there?

Director of Governmental Affairs.

. . . .

[3] Q. What were your general responsibilities during the 10 years that you were manager of the Engineering Land Department?

A. General responsibilities covered the entire gambit of land matters -- responsibility for land acquisition, for land planning, for acquisition of major right-of-ways, power plan projects, substations, public hearings, zonings in connection with the uses of those properties --

Q. And you were planning engineer of the Engineering Land Department in 1972 and 1973 when the events that are the subject of this lawsuit were taking place?

A. Yes, I was.

Q. What particular responsibilities did the manager of the Engineering Land Department have with respect to actions of the City in terms of zoning and planning such as involved here?

A. The planning engineer of the Land Department had the total responsibility for determining the use of property, what types of actions were required within the corporation to process rezonings to obtain the information needed and used in the appraising of land and in the acquisition of land.

[4] Q. Okay. Now, in your duties with the company over the years, have you been involved in the development of land as well as the acquisition of it?

A. Yes, I have.

Q. And can you give us some examples of those types of responsibilities?

A. Well, to speak as far as the company is concerned, I have been involved in the acquisition of properties and processing their building permits, the zonings, the land use requirements for many of our office buildings, for instance, our corporate office headquarters, I was planning engineer of the Land Department during the acquisition, the planning for it and the building and zoning requirements for that facility.

. . . .

[7] Q. When did the company first become interested in the subject property?

A. In 1965.

Q. What was the interest of the company at that point?

A. Well, the company, in the process of its operation as a utility, must look ahead for future power plant sites. It is very common for utility companies to continually investigate appropriate locations for these facilities. It's obvious with the long-time delay between the acquisition of a site and the use of it for a power plant facility for these types of purposes that a lot of things can change on the property. It's always envisioned the property will not, in any event, go down in value, that it would ordinarily be available, if it can't be disposed of, so that it is proper to acquire sites for long-range power plant purposes. That was the case of the company's interest in acquiring this parcel of property.

[8] Q. So you identified a need for acquisition of this property?

A. A long-range planning need for utility power plant purposes.

. . . .

Q. What specific steps did you go through until the property was actually acquired?

A. Searching of properties, determining who had ownership to the property, determining land use zonings, determining what interests were involved by others other than the actual fee owner of the property, making appraisals on the property, and ultimately then negotiating for its acquisition.

[9] Q. In the course of those investigations, did you have consultation with the City of San Diego?

A. Yes, we did.

Q. What was the nature of those consultations?

A. Consultations with the City planning engineer and primarily in connection with disclosing that we were planning to look at this property for a future power plant site, and actually in negotiating to acquire a parcel of land from the City of San Diego.

Q. Then eventually how much property was identified for acquisition in the area of the subject property?

A. Approximately 258 acres -- 260 acres.

Q. And approximately how much was paid for that property?

A. A million -- Approximately $1,770,000.

Q. Okay. Now, you've indicated that, in fact, one of the parcels was acquired from the City of San Diego?

A. Yes, sir.

. . . .

BY MR. GOEBEL:

[12] Q. Mr. DeVore, you previously started to describe some of the general characteristics of the subject property. Would you continue and discribe the zoning and general plan designation of the time of acquisition?

A. Well, the general plan designation was industrial. A portion of the subject property lying immediately adjacent to the Santa Fe railroad right-of-way, which is immediately adjacent to our west property line, is zoned industrial. A portion of the property lying adjacent to the

southeast quadrant of Interstate 5 and Carmel Valley Road was zoned A-1. A piece -- The small parcel of property in the upper left-hand corner or in the northwest of the property that's outlined in red on the map is zoned R-1, and that's it, sir, for the subject parcel.

[13] Q. Okay. Now, does Plaintiff's 1 then depict fairly and accurately the physical condition of the property as it existed in 1966?

A. Yes, sir.

Q. And does that also generally depict the condition of the property in 1973?

A. Yes, sir.

. . . .

[25] Would you describe for the Court what uses are authorized within the M-1-A zone?

A. In a broad sense, generally industrial uses, but in a little more detail, research development, what is considered light manufacturing such as electronic parts, various types of assembly facilities, storage, generally those facilities compatible with producing or the production of salable articles, commodities.

Q. What uses are authorized in the A-1-10 zone?

A. Houses, farming, golf courses, raising of animals, but the number is restricted as is the number of houses per acre.

Q. What is the density of residential development permitted?

A. In the A-1-10 zone?

Q. Yes.

A. One house for every 10 acres.

. . . .

[34] THE WITNESS: What happened was: Prior to the down zoning, this area was zoned industrial, and after the zoning --

BY MR. GOEBEL:

Q. Mr. DeVore, so the record is clear, you're then pointing --

THE COURT: Those areas marked A and B?

THE WITNESS: I'm sorry. I'll do a better job.

Prior to the final action by the City Council, the subject property marked "A" on the map was zoned industrial. After the rezoning, the property marked -- subject property A on the map was rezoned agricultural, A-1-10. The property shown as "B-1" remained industrial, and a portion of property that had prior to the down zoning action been designated A-1-1 was accepted by the Council as remaining for future development upon the filing of a specific plan map, and that's shown on the map marked Exhibit C -- or letter C.

BY MR. GOEBEL:

Q. There's another parcel designated B-2 to the west of the railroad tracks?

A. That's correct.

Q. And what happened to that one?

A. That was originally industrial, that area shown in B-2, and after the down zoning, remained industrial.

Q. Then was there any other action before the City Council in June of '73 with respect to the subject property?

A. Yes. On June 19th, 1973, the City Council adopted an open space element to the general plan.

[35] Q. Okay. And as of June 19th, 1973, what was your understanding of the ultimate outcome of the various actions taken by the City with respect to the subject property?

A. Well, the City Council had down zoned a portion of our industrial property shown on the map as -- under letter A, to agricultural, and they had drawn a line near the midpoint in the

property, and everything south of that was industrial and/or reserved for industrial, and then everything north of that line had been earmarked for open space.

Q. Okay. Did subsequent investigation indicate a different result, actually?

A. Yes, it did.

Q. And how did you learn that?

A. We were at a meeting of the -- of a planning group in the Torrey Pines area, and after some two years of working with the City on attempting to keep our property industrial, we were comparing maps, and we determined that the map that one of the persons had at that meeting showed a different area of open space than the one we had. We later -- or within a very short time the next day, we reviewed the records of the City Clerk to determine actually what maps would be correct, and we found that the map that was on file at the City Clerk's office actually showed all of our property as being designated open space.

[36] Q. And approximately what date was this?

A. Within a very few days after the 19th. I'm not certain I can remember.

Q. Mr. DeVore, I ask that a document entitled, "Plan for Presevation [*sic*] of Natural Parks for San Diego," be marked for identification as Plaintiff's 11. It contains writing on the front "Exhibit 1."

(Plaintiff's Exhibit No. 11
was marked for identification.)

Mr. DeVore, I ask you to examine Plaintiff's 11 and see if you can identify it?

A. Yes. It -- It's a copy of the Plan for the Preservation of Natural Parks for San Diego and was obtained by one of my people from one of the members of the Planning Department of the City of San Diego.

Q. Would you examine Map 1 in Plaintiff's 11 and determine if it's any different as to the subject property from Map 1 in Plaintiff's 10?

A. Yes, it is different.

Q. How does it differ?

A. Well, it differs in that part of it is light green now instead of dark green, in fact, most of it is light green, and it covers what I assume to be and I believe to be all of our property south of Carmel Valley Road and east -- or west of Interstate 5.

[37] Q. Now, would you also examine in Map 2, in Plaintiff's 11, and Map 2 in Plaintiff's 10 to determine if the same difference appears?

A. Now, what was the question, please?

Q. See if the same difference appears with respect to Map 2?

A. Yes, it does; yes, it does appear. One covers all of the property, and the other covers that portion which was the north line of what I call the down zoning.

Q. Okay. And there appears to be a legend by colors on Map 2 to Plaintiff's 11. What is the color-coded information with respect to the subject property? This is Plaintiff's 11.

Q. Okay. It designates different methods of obtaining the open space. The darker green is to be acquired from the public through public and private means, and then there's a lighter shade of green which is limited development to be obtained through limiting the development of the land, and that real light green on the map is to be -- is lands that are already publicly owned and are to be retained and not disposed of.

Q. And what color is the subject property?

A. The subject property is dark green which represents acquisition through public or private means.

. . . .

BY MR. GOEBEL:

[39] Q. Mr. DeVore, I've put down the next overlay on Plaintiff's 1 which we will ask to be designated Plaintiff's 1-C, which is entitled

"Industrial Zoning as of June 3, 1973." Would you approach the exhibit, please.

(Plaintiff's Exhibit No. 1-C was marked for identification.)

Does that then represent the extent of industrial zoning to your knowledge, that existed as of June 7, 1973?

A. Yes, sir.

Q. And what's the significance of the cross-hatched parcel?

[40] A. The significance of the cross-hatched parcel represents that portion of our property that was agricultural, but during the rezoning was earmarked for reservation for future industrial upon the filing of a specific plan.

Q. Okay. Now, I'll drop down to the next overlay which is entitled "Open Space Reservation, June 19, 1973," and ask that to be designated Plaintiff's 1-D.

(Plaintiff's Exhibit No. 1-D was marked for identification.)

Does that depict the area that was, to the best of your knowledge, designated in Plaintiff's 11 as open space for public acquisition?

A. Yes.

. . . .

[41] Q. Mr. DeVore, I previously asked you a question that, to the effect -- as of June 19, 1973, what was your understanding of the outcome of the various acts of the City, and that was before you had learned of the discrepancy? Now, after you learned of the discrepancy, what was your understanding of the total outcome of the acts of the City?

A. The total --

MR. SUMPTION: Objection, your Honor; irrelevant.

THE COURT: Overruled.

THE WITNESS: Well, the -- our reaction was that --

BY MR. GOEBEL:

Q. Your understanding of the effect of it.

A. My understanding of the effect of it was and is that the property now had over it an open space overlay zone that took precedence over the agricultural and industrial zone, and there are little or no uses that one can make in the open space zoning for any economic value, that we had completely lost within a period of time our industrial zoning.

Q. Okay. What action, if any, did you take after learning of this discrepancy?

A. I immediately -- several of us, myself included, contacted the City Planning Department on several trips over there, several phone calls, and explained to them the circumstances that we felt had taken place, the confusion or the filing of certain maps that were not at the public hearing.

[42] Q. Did you take any action to formally communicate your objections to the City?

A. Yes. I wrote a letter to -- finally wrote a letter to the Planning Director asking him to clarify or rectify the situation in that we believed that a considerable injustice had been done to our property.

MR. GOEBEL: I request that a letter dated November 14, 1973, from Mr. DeVore to Mr. Goff be marked as Plaintiff's 12.

THE COURT: It may be so marked.

(Plaintiff's Exhibit No. 12 was marked for identification.)

MR. GOEBEL: And a letter dated January 31, 1974, from Mr. Goff to Mr. DeVore be marked Plaintiff's 13.

THE COURT: It may be.

(Plaintiff's Exhibit No. 13 was marked for identification.)

BY MR. GOEBEL:

Q. I show you Plaintiff's 12, Mr. DeVore, and ask you if you can identify that?

A. Yes, I can. It's a copy of the letter that I mailed to Mr. Goff on November 14.

Q. Okay. What action, if any, did the City take in response to your letter?

[43] A. Mr. Goff wrote a letter back to me stating that he concurred that there was an error made and that we should have been present to protect our interest.

Q. I show you Plaintiff's 13 and ask if that is a letter you received back from Mr. Goff?

A. Yes. It is dated January 31st.

Q. I would offer Plaintiff's 12 and 13.

THE COURT: Any objection?

MR. SUMPTION: No objection.

THE COURT: They are received.

(Plaintiff's Exhibit Nos. 12 and 13, previously marked for identification, received into evidence.)

BY MR. GOEBEL:

Q. Mr. DeVore, we've now discussed the subject of rezoning, and we have also discussed the subject of adoption of the open space element of the general plan. To your knowledge, did the City take any further steps during April to June of '73 with respect to acquisition of park preserve areas?

A. Well, they began to conduct a campaign toward interesting the voters and informing the public on the concept of having voter approval to acquire the open space lands. There was effort on behalf of the City and other groups to elicit support for advertising and what have you preparatory to the September election.

[44] MR. GOEBEL: And I ask that a document entitled "Staff Report, Park Preserve Systems, April 23, 1973," be marked for identification as Plaintiff's 14.

THE COURT: It will be so marked.

(Plaintiff's Exhibit No. 14 was marked for identification.)

BY MR. GOEBEL:

Q. Mr. DeVore, I show you Plaintiff's 14 and ask you if you can identify that?

A. Yes. It's a staff report on park reserve systems, April 29, 1973, and it's my knowledge that it was prepared by the Community Development Department.

Q. Okay. The back of that, Plaintiff's 14, there is a fold-out map. Can you identify the subject property on that map?

A. Yes, I can. It's in a group of properties marked No. 3. It covers all of our property. That portion they wish to acquire includes all of our property east of Interstate 5 -- I'm sorry, west of Interstate 5, and it's grouped in a group that's referred to as the Los Penasquitos, McGonigle Canyon, Carmel Valley --

Q. Now, also included in that same Plaintiff's 14 is a table entitled "Table to Park Reserve Funding." Can you locate any reference to the subject property on that?

A. Yes. It's listed here under "map area 3-A and 3-B."

Q. And what words does it -- Does it use words?

[45] A. Yes. Opposite the 3-A map, it has "Community Subdivision, Penasquitos and $900,000 total cost, percent of City participation 75 percent, bond funds $675,000 and assessment district's revenue sharing $250,000."

3-B is McGonigle Canyon and the total cost $675,000, and City participation 75 percent, bond funds $506,300, and assessment district revenue sharing $768,700.

Q. Referring to the -- back to the map in the area you've previously testified to as Area 3, would the area east of Highway 5 in the area designated "3" commonly be referred to as McGonigle Canyon?

A. Yes, sir.

MR. GOEBEL: I ask that a newspaper clipping entitled "Proposition B, Proposed Park -- Park Preserve. . ." -- they changed the name on me -- "Proposed Preserve Systems" be marked for identification as --

THE COURT: 15.

MR. GOEBEL: -- Plaintiff's 15.

THE COURT: It may.

(Plaintiff's Exhibit No. 15 was marked for identification.)

BY MR. GOEBEL:

Q. Mr. DeVore, I show you Plaintiff's 15 and ask you if you can identify that?

A. Yes

Q. What is it?

[46] A. It's a picture that appeared in the San Diego Union on September 4, 1973, and is identical or nearly identical to that that was prepared by the Community Development Department showing the various properties to be acquired under the park bonding issue if it was successful.

Q. Can you locate the subject property on that graphic presentation?

A. Yes. It's again shown in group 3 and is referred to on the map as Los Penasquitos Lagoon, Carmel Valley, McGonigle Canyon.

Q. Would you indicate that on -- in red, drawing a circle around it. You've now placed a red circle around the subject property as it appeared in Plaintiff's 15.

A. Yes, sir.

Q. Would you do likewise with respect to Plaintiff's 14?

You've now indicated on Plaintiff's 14 in a red circle the subject property

A. Yes, I have.

Q. Would you also in the table highlight the two entries that you had referenced to in red?

Now, Mr. DeVore, following June 19, 1973, to what use has the subject property been devoted?

A. None.

Q. You've made no additional use of the property?

A. None at all.

[47] Q. Prior to June of 1973, had the company contemplated any possible development of the subject property for industrial uses?

A. Yes. We had contemplated some other uses of it. We were beginning to learn through various studies and reviews that the property would probably not be suited for a power plant site, and therefore began to give considerations to doing something with the property in order to return its investment to the rate payers and while we had not -- while we had not actually filed maps or prepared drawings, there were discussions within the management level of the corporation giving this some early consideration.

Q. Following June 19, 1973, did you consider applying for necessary approvals for the development of the property for industrial use?

A. No, sir.

Q. Why not?

A. Because it was our opinion -- and I recommended that based upon past experience of seeing other properties in such a position or such a zoning condition not being able to be developed that there being long delays of -- and expenditures in trying to overcome opposition such as had been placed on the property, so that we did not make an attempt to begin a development plan for the property.

Q. So then in your own experience you had observed property owners in similar positions, seen property owners delayed excessively?

[48] A. I have; and there are those in this community.

Q. In your judgment, are there any practical, beneficial or economic uses to which the company can devote the property in the condition that existed after June 19, 1973?

A. No.

. . . .

[58] THE COURT: Do you have an opinion as to whether there are any economic uses the company could devote the property to subsequent to June 19, 1973?

THE WITNESS: Yes, I do.

BY MR. GOEBEL:

Q. Mr. DeVore, what steps have you gone through in terms of developing that opinin [*sic*] in terms of investigation, analysis, considerations that were applied to developing that opinion?

A. Well, I have reviewed, for example, the agricultural zones of the City of San Diego, and I have been experienced -- I have ample experience in reviewing and listening to the City Planning Department and the City Council discuss other similar matters where there was an open space zoning over the land.

Insofar as there being any use, economic use, that you could put the open space land to, it is my opinion that there is none. If one were to go back one step removed and say, well, all right, but maybe you could put it to some use under an agricultural zone which is probably the nearest thing to an open space zone that we have, the agricultural zone permits one house for every 10 acres, and that is not economical. One might say, well, there's a possibility of a golf course, and there are, what, 60, 70, or 76 of those in our community, and they must all have some source of income other than just a golf course, and one could not
[59] put a golf course here with houses at one for every 10 acres. You could not feasibly, in my judgment, from my knowledge of managing farm lands, farm this property. You could not raise livestock on it because

you are limited to the number. There are many examples that can be referred to in our community and in the surrounding region where people under the same circumstances have not been able to develop their land for anything at all, and I find that there is just no economic benefit to this property, and I so advised the corporation, and they have accepted that position.

Q. Okay. In your judgment, are there any practical or beneficial uses, aside from the ones you've addressed yourself to, that the property could be devoted to by a private property owner?

A. No. I think for the most part with the open space zone on our property, we've given the property up for public use, and I think that's where the property and the interests of the property exist at this time.

Q. In your opinion, is the property marketable at present?

A. No, sir, it is not.

. . . .

BY MR. SUMPTION:

[66] Q. Okay. So it was the same green open space plan that you had received a copy of, only you noticed that there apparently was some difference in the map?

A. Yes.

Q. Was this in connection with a community plan?

A. No, sir. At a community plan meeting, a group of citizens approved by the City Council who were involved in trying to determine what the best interests were for their own community insofar as land use is concerned.

Q. Do you remember if any City staff members were present, City employees?

A. I don't remember.

Q. Mr. DeVore, I believe that you testified in reference to Plaintiff's Exhibit 1-C that the area marked with a "C" in it that's got blue lines drawn across it was indicated an area that was earmarked for future industrial use. Could you explain what you mean by earmarked?

A. Well, earmarked was a quote on quote, a word I used. The precise language of the council's action was that the property was going to be left in its agricultural zoning, but it could be used for industrial upon the filing of a future specific plan.

Q. All right. You also indicated, I believe,

. . . .

[78] Q. Has the Gas & Electric Company solicited any offers to purchase the subject property since the actions of the City in connection with the rezoning and open space designation?

A. No, we have not.

Q. Mr. DeVore, I believe you testified that you have, through a review of the various City zones, permitted uses in the various City zones and also in connection with your observations of the city with respect to actions with respect to allowing land uses of properties, have concluded that the open space designation would preclude these -- or perhaps preclude is not an accurate description, but in view of that designation, the City would not allow, in your opinion, any use of that property; is that a correct statement of your testimony?

A. I don't think that's a correct statement of my testimony. I think my testimony was on the basis of economic use, not that the City wouldn't allow a use. I have no doubt that the City would allow you to try to run the prescribed number of cows, for example. I don't know that they would permit you to build a house down in the valley.

Q. Mr. DeVore, for example, the -- your understanding is the open space designation encompasses the whole of the subject property excepting the portion marked B-2?

[79] A. Yes.

Q. Is that not correct?

A. Yes.

Q. And that portions to the south of the line that we see on Exhibit 1-B, that's drawn somewhere in the middle portion of the property in an approximate east and west fashion, are zoned for M-1-A industrial use.

Was your testimony that you didn't believe the City Council, in view of the open space designation, would not allow any industrial use of that property?

A. That was my testimony.

Q. Well, that's what I was referring to. Apparently I didn't focus in specifically enough on it.

Are you aware of any particular instances where the City has denied an application for the use of any piece of property within the City on the basis that there's an pen [*sic*] space designation on the property, but there is also an underlying zoning, and the application entails something permitted by the underlying zoning?

A. I'm not specifically aware of those, and perhaps other witnesses can testify to that, but I do have knowledge that the City -- of properties within the city that have been held up from zoning for many, many years because of the open space zoning designation on them -- or from development, I mean.

Q. Isn't it a fact that the properties you're referring to have been or are in the process of being purchased by the City?

[80] A. Well, they were -- They are -- They may be now in the process of being purchased, but at the time of the owner's plans to develop them, they were not -- the City did not intend to acquire them, but after several years, that's the way it's worked out.

Q. Do you have any knowledge of whether or not the owner may have consented to a delay or deferral of the plan to build because the City was interested in purchasing?

A. There are those instances where, after a period of many, many tries and attempts and expenditures, that the developer has agreed to delay planning because the City finally has said, "We'll consider buying it."

. . . .

Excerpts from testimony of **Donald Worley**:
(Called as witness by the Plaintiff)

. . . .

[82] Q. Would you give the Court a brief background of your formal educational experience?

A. Yes, I was graduated from Yale University in 1960 with a Bachelor of Arts in Psychology. I have a year of graduate work in psychology at the University of Michigan, and I graduated in 1970 from the University of San Diego School of Law with a juris doctorate, magna cum laude.

Q. Since that time, have you been engaged in the private practice of law in San Diego?

A. Yes, I have.

Q. Have you developed a specialty in an area of practice in that time?

A. Yes, I have. I specialize in zoning, planning and land use regulation law.

Q. Could you be more specific in terms of the types of matters that you might become involved in in the course of your practice in that area?

A. Generally, I would be involved with advising clients as to the application for and the process of applications for the development of land including rezonings, subdivision maps, planned residential development applications. I would represent them before the political bodies including Planning Commissions and City Councils, and I would also conduct civil litigation involving those issues.

[83] Q. Without breaching any client confidences, can you indicate some of the projects you've been involved in over the years of your practice in this general area?

A. Yes, I think I can indicate some representative clients. I have handled basically all of the zoning and planning work for Marin Housing Guild (phonetic spelling), Larwin, and I represented Dr. Leonard Bloom in all of his proceedings before the City of Chula Vista

concerning the Sports World Plan, concerning the Plaza del Rey Shopping Center. I've worked with the Pacific View Construction Company concerning the processing of development plans for the Tecolote Canyon area. I've represented other clients including Harry L. Summers, Incorporated, Avco Community Developers, Southern District Council of the Assemblies of God Church, the Diocese of San Diego, and other clients all concerning land use methods.

Q. Have some of these matters actually involved designation of properties as open space?

A. Yes.

Q. By governmental agencies?

A. Yes.

[84] Q. Have you, in fact, represented some governmental agencies in the course of your work?

A. Yes, recently I've represented the Local Agency Formation Commission concerning the requirements for the environmental impact for the deannexation of San Ysidro, and I recently represented the City Council of the City in a conflict of interest lawsuit.

Q. Mr. Worley, we're concerned here with the rezoning of certain property and designation of certain property as open space in the open space element to the San Diego general plan. You're familiar with the legal background of the adoption of the open space element to the City's general plan, are you not?

A. Yes, generally familiar.

Q. And you're also familiar with the various processes and requirements of the City of San Diego with respect to the processing of development applications in San Diego?

A. Yes, I am.

Q. And you're familiar with the applicable law that's related thereto?

A. Yes, I am.

Q. And you're familiar with the practical aspects of litigating matters resulting from disputes in that area?

A. Yes, I am.

Q. Now, we have in evidence in this matter the fact that the property described on the exhibit that I'm now indicating to you -- trying to indicate to you -- the property outlined in green on Plaintiff's Exhibit 1-A was formally zoned M-1-A. Then we further indicate that a portion of that property was rezoned to A-1-10, the parcel designated as parcel A on Plaintiff's Exhibit 1-B, that the underlying zoning with respect to parcels B-1 and B-2 on the same exhibit remained M-1-A.

[85] Then we further have in evidence then that accordingly parcel B-1 and B-2 of Plaintiff's 1-C remained in the industrial zone. We further have in evidence that the defendant City of San Diego in the adoption of its open space element to its general plan in June of 1973 designated this entire property that I've previously referred to as open space for acquisition through public or private means as depicted on Plaintiff's Exhibit 1-D, so those matters are in evidence here, and I ask you to assume for purposes of the remaining questions that those are the facts.

Just to review those assumptions again, I wish you to assume that the property that we're talking about, the subject property, has been designated as open space in the City's general plan as of June, 1973, and I want you to assume that a portion of that property has an underlying or existing zoning of M-1-A, light industrial. I want you to further assume that a development proposal was formulated which, in all material respects, conformed to the customary land use criteria applied by the City of San Diego with the exception of the possible relevance of

[86] the open space designation.

Do you have these assumptions now in mind?

A. Yes, I do.

. . . .

BY MR. GOEBEL:

Q. What is your professional opinion, assuming those facts, Mr.

[87] Worley?

MR. SUMPTION: I will object to the question on the basis that, number one, it calls for speculation. Number two, on the basis that I

indicated at the preliminary proceedings before the trial commenced that under Evidence Code Section 801, the Opinion I don't believe would aid or assist the trier of fact which is the criteria for introducing testimony by way of an expert witness. It, in essence, calls for a mixed question of fact and law, and in the factual aspect as to -- is there any reasonable probability of what the Council might do as far as approving such a hypothetical plan is -- would be purely speculative without knowing what the plan is so that the -- and without all the other elements such as department staff analysis, recommendations, pointing out the physical effects, environmental impact reports, et cetera. There would be no way that anyone, with all due respect to Mr. Worley, could predict such an outcome of this hypothetical situation.

[87] THE COURT: Mr. Goebel?

MR. GOEBEL: Yes, your Honor, I have sought to meet the objections of counsel in asking the witness to assume that the proposed development plan conforms in all respects with the land use criterion customarily applied by the City of San Diego. I might add that I will be offering testimony at a later time in the trial indicating that, in fact, in the opinion of another expert, such development plan did exist and was
[88] available, could have been devised as of June of 1973 that would have conformed and that there was a reasonable probability that that development would have been approved by the City of San Diego in the before condition of the property without the open space designation, so I'm asking this witness to assume that, and if --

THE COURT: You say this evidence that would be presented through another witness that you intend to qualify as an expert?

MR. GOEBEL: As an expert in the area of land use planning.

THE COURT: I assume Mr. Sumption would object to that opinion as well.

MR. SUMPTION: I would, your Honor, and I don't see what relationship that has to the question now being asked.

THE COURT: Mr. Goebel is now addressing himself to the relevance as distinguished from the expertise of the witness.

MR. SUMPTION: I understand that, but I don't even believe that it would be relevant as to what could have been done in the before condition and now what might be done with the property in the after condition. As far as the hypothetical, it's never been put before the City Council.

MR. GOEBEL: Well, we were looking at the property -- we have to establish what the before condition was and what the after condition was. The cases indicate that we do not look at these matters in the
[89] abstract. We look to the specific property. We look to see how the particular purported exercise of the police power, what impact it has on the specific property, not what it has on some arbitrary property off in the abstract, and so here I'm asking the witness to assume all the details.

THE COURT: I understand. The objection is not to the -- is not to the content -- Well, yes, perhaps it is. I see a difference here, Mr. Goebel, between the witness stating as an ultimate opinion whether the City Council and/or Planning Commission would have taken particular action from the circumstances which is admissible of an expert who is giving a valuation opinion, making an assumption as a basis or part of the basis for that opinion that the City Council or Planning Commission would not approve or would approve a zone change, but for the taping.

MR. GOEBEL: Well, we approach the subject very freshly in straight condemnation actions in the area of the highest and best use. We have to have an expert to testify that if the appraiser intends to use the highest and best use not called for by the zoning, we ask the expert to testify that there's a probability that the higher use could be obtained.

THE COURT: That's the point I was just making. That determination is a part of that which goes to make up his opinion. Here, you are asking for this as the opinion.

MR. GOEBEL: Well --

[90] THE COURT: The trier of fact in the other circumstances can weigh the opinion based upon the reasoning of the witness, and if the trier does not accept as proper reasoning that the Council would or would not have, then it either adds or detracts from the ultimate opinion, but here you're asking to let in that opinion.

MR. GOEBEL: Well, the --

THE COURT: It's difficult for me to concede how this witness or any other witness could form a meaningful opinion as to what the City Council would do in the abstract.

In essence, you're asking the witness to state that the City Council would not grant any use under any circumstances once they put open

space on it. That's what --

MR. GOEBEL: I've framed it in terms of reasonable probability, and I guess I am approaching the question in the affirmative when it could also be approached in the negative, is there a reasonable probability that the City Council would use the open space designation to bar development of the property irrespective of whether a good development plan --

THE COURT: And that is what is not the subject of expert opinion. That is simply surmise on any witness' part as -- that the City Council would do that.

MR. GOEBEL: Well, this witness has testified that he appears regularly before the City Council and he's giving the benefit of his practical experience that the Court cannot have because of being tied to the courtroom.

[91] THE COURT: But his appearing regularly before the City Council does not make him clairvoyant as to the thinking processes of the City Council members.

MR. GOEBEL: Well, I'm not asking him to opine, and I will direct him not to opine on the subjective motivation.

THE COURT: But you're asking him to do that when you're asking him his opinion.

Mr. Worley, have you personal knowledge of the City Council denying applications for zone change or variances or any other applications made to them solely on the basis that the property has been designated for open space?

THE WITNESS: Yes, your Honor, I do.

THE COURT: And in how many such instances?

THE WITNESS: One within the past year that I was personally involved with.

THE COURT: And the City Council stated that that was the sole reason for their denying the application?

THE WITNESS: I would have to answer that question no, they didn't so state it, but in light of all the circumstances, no other reasonable inference could be drawn.

THE COURT: In your opinion?

THE WITNESS: In my opinion.

THE COURT: And therefore you see, Mr. Goebel, he's endeavoring to infer an opinion from an opinion.

MR. GOEBEL: Well, I guess I keep --

THE COURT: Why is this witness in any better position to form the
[92] mental processes of the City Council than the Court, given the facts of the presentation or application to the City Council?

MR. GOEBEL: Well, I guess I keep shifting back from expertise to relevancy because in my mind they're so closely tied together, but it seems to me I'm asking this witness to do the same thing in his area of expertise as we asked Mr. DeVore to do in the area of economic feasibility. We could have the economist sit down and do a mathematical model of the economics, but I felt that the testimony is more proper to have a person with practical experience such as Mr. DeVore testify to that. Here, I'm asking this witness not to define the subjective motivation of the City Council, but to testify based on his practical experience as to what is the feasibility of getting a plan through, given the fact of this designation.

THE COURT: But his practical experience is solely resting upon his subjective opinion of the mental processes of the City Councilmen.

MR. GOEBEL: Well, it's also resting upon two different legal bases. He also is aware of the law, and he's aware of the practical aspects of litigation of these matters, and they are two separate legal bases upon which the Council could, as a sole basis, deny this project.

MR. SUMPTION: And that, your Honor, would be calling for what
[93] the City would do as an attorney, and the City is not an attorney. The City Attorney's Office advises the Council. There are so many elements that make it pure speculation that I can't see that it can be advisable.

THE COURT: The objection is sustained. You may endeavor to lay a further foundation, but under the present status of the evidence --

MR. GOEBEL: I'm not -- Perhaps I can have the objection -- basis for the ruling restated that it's on the ground that the witness would be required to speculate?

THE COURT: Yes, he is not sufficiently qualified to give an opinion as to what the City Council would do under the hypothetical you presented.

MR. GOEBEL: Well, let me attempt to rephrase the question.

THE COURT: You may.

BY MR. GOEBEL:

Q. In your -- Do you have a professional opinion as to whether the City of San Diego could purport to deny any industrial development plan on this property based on the assumed facts on the sole basis that the development proposed was inconsistent with the open space designation on the subject property?

A. I --

MR. SUMPTION: Object, it's closer to a pure legal question of interpretation of the effect of the acts done by the City Council.

[94] THE COURT: If I understood the question as phrased, the question was whether he had an opinion that the City Council could purport to deny the application.

MR. SUMPTION: I interpret that as meaning, your Honor, are they legally compelled to do one thing or the other, and I don't know if that's the intent.

THE COURT: As phrased, it's asking the witness whether that is physically possible, and, of course, the answer has to be yes. That's obviously not what he meant. Would you rephrase the question?

MR. GOEBEL: I think I'll approach it a different way.

Q. Mr. Worley, in your professional opinion having advised clients in this area on a number of instances, would it have been on the basis of the assumed facts, reasonably prudent for a property owner to incur the expense of preparing development plans and submitting them for approval to the City of San Diego?

MR. SUMPTION: Object to the question. I think it's just seeking indirectly what the Court has ruled cannot be asked directly. I think it's just one step removed.

MR. GOEBEL: We're not into a different area, talking about the plaintiff being deprived of any practical additional or conomic use of the property, and one element is the fact of whether it wuld have been prudent for the plaintiff, as the property owner, to have incurred the expense necessary to even reach a decision as to whether or not the
[95] property could be developed.

THE COURT: If the question, Mr. Goebel, is designed to explain the reason why the plaitiff did not seek such relief from the City, it would be relevant and admissible. On the other hand, if the thrust of the question is to convince the trier of fact that the City Council would not have granted the relief, it meets the same objection that the Court has earlier sustained.

MR. GOEBEL: Well, I would apply it to both, but I think it's admissible then for the limited purpose that the Court has indicated.

THE COURT: The Court will admit it for that limited purpose.

The substance of the question is whether you, in your expert opinion, would have advised the plaintiff that it would have been meaningless to have prepared and submitted plans to the City under the circumstances.

THE WITNESS: Yes, I would have so advised.

BY MR. GOEBEL:

Q. Mr. Worley, what is the basis for your opinion -- or would be the basis for your advice?

A. Well, the basis would be that, in my opinion, the open space designation would preclude development for several reasons. The first
[96] being the existence of a section of the planning act which, by its terms, preclude development by precluding issuance of a building permit or the approval of a subdivision map if the particular development is not consistent with the open face [*sic*] element.

Secondly, there's a provision of the Subdivision Map Act, and I would also presume that a development of this magnitude would likely result in the requirement for the filing and recordation of a subdivision map bringing into play that requirement of the Subdivision Map Act. I believe that's Section 66474 of the Government Code which mandates that a City Council deny approval of a tentative subdivision map if it is not consistent with applicable general and community plans inasmuch

as the open space element is a portion of the City general plan, it would -- the subdivision map would be inconsistent with the open space element since the second legal ground and the third would be simply that the designation of the property as open space, based upon my experience, is indicative of the Council will not to permit development on that property, and based on my experience, they would do everything possible including full use of the legal and Code sections that they have available to preclude development and to deny a development plan, so I believe that all things considered, it would not be prudent or not be a prudent expenditure of time and money to process a development plan under the circumstances.

MR. GOEBEL: I have no further questions.

THE COURT: You may cross-examine.

- - -

CROSS-EXAMINATION

BY MR. SUMPTION:

[97] Q. Isn't it a fact that you have pending in this Superior Court a lawsuit entitled Hall, et al., vs. The City of San Diego that raises substantially the identical issues that you've just testified to?

A. Yes, that's correct.

Q. Mr. Worley, are you aware of an instance, any instance wherein the City Council has approved development of property notwithstanding an open space designation on that property?

A. I'm aware of only one instance in which they have done so.

Q. Is that Jutland Canyon?

A. Yes.

Q. And I believe you testified that you're aware of one instance where you reached the opposite interpretation; is that not correct, that is, a rejection by the City Council based --

A. There was one instance within the last year in which I represented a client in which the subdivision map was denied basically because the property was designated as open space on the community plan.

Q. From those instances, you have concluded that the City Council in this particular context would interpret that no use of the property in
[98] accordance with the underlying zoning is consistent with open space?

A. Could you ask the question again?

Q. Well, I believe you testified that your interpretation of the Subdivision Map Act and the State Planning Act requires consistency with open space or, in the converse, it would compel a rejection of the proposed construction or the subdivision map?

A. If it were inconsistent with the open space plan, that's my interpretation.

Q. Therefore, do I understand your testimony in the context of this particular property wherein you are asked, "Would you have advised this plaintiff not to pursue a project to be granted or denied by the City for building on the property?" To mean that you feel the City Council would necessarily interpret any such development as being inconsistent with open space?

A. It would most likely do so, especially if it didn't want the property developed.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Worley, you referred to the Jutland Canyon Project. Were there any factors present there which you have considered to be persuasive in causing the Council to approve the project even though it was designated for open space?

[99] A. I believe so. I was not personally involved in that project, but I do believe that the particular community plan designation has an express alternative land use and that either park or open space or this alternative residential land use by the terms of the community plan itself would be deemed to be consistent with the plan, and I believe that the Council used that alternative in justifying it, but I also am aware that that particular project is still in litigation and has not been finally approved -- has been challenged in the court.

. . . .

Excerpts from testimony of **A. Lee Griner**:
(called as witness by plaintiff)

[108] THE WITNESS: My name is A. Lee Griner, G-r-i-n-e-r.

DIRECT EXAMINATION

BY MR. GOEBEL:

Q. What is your current residence address, please?

A. 86712 Aries Street in La Mesa.

Q. Are you presently employed?

A. I'm part-time self-employed. I'm -- Excuse me.

Q. What trade or occupation?

A. Consultant and foreman, ranch development and natural resource conservation.

[109] Q. Briefly, what has been your employment history?

A. I worked about 28 years for the Soil Conservation Service of the U.S. Department of Agriculture since 1956 in San Diego County.

Q. Starting in 1957, could you briefly describe the nature of your assignments with the Soil Conservation Service?

A. The work was primarily as a consultant with private land owners recommending crops that could be grown on certain types of soil, the type of treatment that would be necessary to be successful with each undertaking, the type of irrigation to carry out irrigation techniques necessary dependent on the quality of water, things of this nature.

Q. Did this take you to all parts of San Diego County?

A. Yes.

Q. And into all types of agriculture regularly conducted in San Diego County?

A. Yes.

Q. And I take it you were employed by the Government, and the Government paid for your advising private property owners; is that right?

A. Yes. The Soil Conservation Service worked through Resource Conservation Districts which are legal subdivisions of the county in which they're organized.

Q. Okay. Now, since your retirement from work with the Soil Conservation Service, what have you been doing?

[110] A. I have been doing consulting work with some ranches in San Diego County, with a couple in Baja California. I've been doing some work for the Department of Agriculture in Mexico in Baja California. I have done some consulting work with some engineering firms in the County and also with some departments of County Government.

A. And your work with these private clients, is it similar to the type of service that you provided when you were employed with the Soil Conservation Service?

A. Yes, sir.

Q. Okay. Can you give the Court a brief synopsis of your formal educational background?

A. I got a degree in -- Bachelor's Degree in Range Management and Wildlife Management from Utah State University, School of Forestry in 1937.

Q. Since that time, have you participated in any continuing education programs in the area of soil agriculture and agriculture management?

A. Yes. The Soil Conservation Service had a very good ongoing training program, usually one or two training sessions each year from one to two weeks in duration. Since about 1955, I directed some of these training sessions.

Q. Are you the -- a member of any professional societies in your area of specialty?

A. I belong to the Soil Conservation Society, the Society for Range Management, and the California Section of the American Society of Agronomy.

[111] Q. Now, the property which we're concerned with in this lawsuit is property located west of Interstate 5. I'm indicating on Plaintiff's Exhibit 1 and south of Carmel Valley Road in the area generally known as Sorrento Valley. Are you familiar with that property?

A. Yes. I was out on it.

Q. Now, have you conducted a study to determine the feasibility of utilizing that subject property for agricultural purposes?

A. Yes, I have.

Q. How did you proceed with that investigation?

A. I got some of the literature that was available, primarily an original soil survey that was made by soil scientists in the old Coastal Soil Conservation District. This was done in about 1950 through 1952. I reviewed their recommendations and their classifications of the soil in that area. I reviewed the final soils mapping that was one in cooperation with the County of San Diego for publication purposes, and that was finished in about 1970. I reviewed the literature on the types of plants that would grow under certain conditions of salinity.

Q. Aside from reviewing the written literature, what other steps did you take in your investigation?

A. I had the Environmental Engineering Laboratory go out with us to the site and take soil tests in four different places.

[112] Q. And did you supervise the taking and selection of these locations?

A. I supervised selection of the locations and depth at which the samples were taken.

Q. And was this sampling technique consistent with -- the technique consistent with the techniques used by the Soil Conservation Service?

A. Yes. Both outfits used what's called a technique 60 of the United States Salinity Laboratory.

Q. Okay. After you had visited the site and taken the -- supervised the taking of the samples, what did you do next?

A. I reviewed the samples and reevaluated them on the basis of what possible plants could go there.

Q. Now, I understand you were at the site. Can you describe for the Court in terms of your specialty the physical condition of the site, that is, the present agronomy of the subject property?

A. The site shows no evidence of ever having been used for any agricultural purpose other than probably some grazing or pasturing. I'm sure there's never been a tillage tool on it, because as dry as it is this year when we were out there, there was no part of it that's dry enough that one can plow or disc or harrow or otherwise till. The areas that show bare on the map over there are primarily salt pans, areas in which there is no vegatation [*sic*] growing. Areas of different shades of brown are occupied by a small variety of highly salt tolerant plants.

[113] THE COURT: What?

THE COURT REPORTER: Salt tolerant plants.

THE WITNESS: Then up in the northwest areas where there's a continuing of blue, this is the area that is occupied more or less regularly by tidal waters and areas that show fingers of broad dark-colored lines or tidal channels that have water where the tide comes in.

BY MR. GOEBEL:

Q. Well, have you obtained the results of the -- Strike that.

Can you describe the nature of the vegetation that you found presently on the property?

A. Yes. It's primarily plants like pickle weed and alkali heath, desert salt bush, salt grass, one or two other highly salt tolerant plants. I didn't make a full catalog because in reviewing the literature, there is some 60-odd plants that have been found and identified in that general vicinity.

Q. Based on your experience of the vegetation that you found on the subject property, does it have any economic utility for grazing purposes?

A. Very little. I would estimate that in the normal year that it would take from 40 to 60 acres to provide enough forage for one cow for one month.

[114] Q. Now, have you obtained the results of the soil test that you supervised?

A. Yes, sir.

Q. What, in general, was the indication of those tests as it relates to viability of the property for agricultural purposes?

A. Extremely high salinity. We had tests made at four sites. One test was simply a surface inch of soil on which white residues existed. This showed an electrical conductivity of 70,000 millimoles which is extremely high when one considers that it's generally recommended that soils higher than 16 millimoles and soil conductivity are unsuitable for any type of economic agriculture without extensive and somewhat artificial land reclamation.

The best soil was -- or the best sample was at a site, I might say, over in -- toward the southwest corner on the -- I'm sorry -- on the southeast corner on the east side of the dike that was put in there when the sewer line was put in. This is an area that I interpreted to be relatively, if not completely, free of tidal action especially since the dike has been put in. The results showed 29 millimoles and was the best soil sample or the best test from that sample, and this at a depth of 12 inches. At six inches, the results were a little bit higher, I think around 14, and at 18 inches depth it was approximately 32.

[115] Q. When you refer to the dike, you're referring to the area of the soil line that shows as a light color on Plantiff's Exhibit 1?

A. Yes, right.

Q. And I take it that that is raised in elevation over the surrounding property?

A. Yes. It's an artificial dike that I presume had to be put in to carry the traffic when the sewer line was put in because you can see extensive sampling of gravel that shows out on the toe of the slope.

Q. The last sample you described was east of that dike?

A. Yes.

Q. Was that near the south or northeast part of the property?

A. It was closer to the north.

Q. Okay. Now, based upon your investigation and upon your years of experience in the field, in your professional opinion, could the subject property be utilized for any economic agricultural purpose?

A. Not for any economic agricultural purpose.

Q. And are there any, in your judgment, any economic means of rehabilitating the property so that it could be utilized for agricultural purposes?

A. Not any means that would -- whereby one could regain their investment let alone make a profit.

MR. GOEBEL: No further questions.

Excerpts from testimony of **William Rick**:
(called as witness by the plaintiff)

[121] Q. And your occupation?

A. Consulting civil engineer and planner.

. . . .

[123] Q. Were you retained to conduct an investigation of the feasibility of development on the subject property?

A. Yes.

Q. How did you proceed with that investigation?

A. The first step, of course, in any job of this kind is to visit the property and to assemble as much information of record as one possibly can. I'm sure your record has shown the descriptions of the property, [124] but the areas of investigation, of course, deal with the service utilities and the -- the services available and needed by the project and the physical characteristics of the property itself and the area in which it is situated.

Now, you can further divide the investigation as to -- and utilities, of course, is the first question, the availability of water service, and we found that the property was well served by existing water mains and by existing service. Of course, we're dealing in the charge upon us to investigate the property as it was situated in early 1972, and my answers will deal in that context.

The next question would, of course, be sewage disposal potential, and we found that the property was well served by sewer service by the City of San Diego. The property being owned by the Gas & Electric Company, we were satisfied that power and gas facilities were available.

We asked the owner to employ soil engineering consultants who made an investigation and reported to us that under certain conditions of handling the property, it was suitable for the construction of an industrial development similar to that which had occurred in the southeast. We investigated the flood control situation, the drainage, and found that under the criteria of the City of 1973, that the property could be developed. Having made that investigation, we realized -- and together with the soil investigation, knew that the project area would

[125] have to be raised above its natural condition, and we know that the same owner owns property north of Carmel Valley Road, and made the assumption, which we felt valid, and did determine that sufficient soil was available from the northerly property to be moved across and to create the working areas south of Carmel Valley Road.

So we satisfied ourselves generally that the physical parameters, the physical conditions, could all -- and demands on development could all be met. So then the investigation had to determine as to what public policy would have permitted or seemingly permitted in 1972 as to a land use, and a look at the general plan and progress guide and general plan for the City of San Diego makes -- reveals it clearly that it was the intent of the City of San Diego that the property in the main should be developed for industrial purposes. The progress guide indicates an extension of Sorrento Valley Road basically in a northwesterly direction, generally parallel over the sewer fill that's been made reference to earlier.

Q. When you refer to the progress guide and general plan, you're referring in part to Plaintiff's Exhibit 9 in evidence; is that right?

A. That's correct.

Q. And that shows a designation for the subject property?

A. Yes. That designation is colored blue and under the category of industrial in the legend.

[126] Q. Did you investigate any other land use control status with the --

A. Of course, you'd like to know how firm, if possible, the commitment is, and so if you go back further to, say, to the County plan, while the County authority had no jurisdiction, but the County in 1967 indicated the same use for the property, so that this gives you a feeling of comfort in selecting or determining that the general plan designation was fairly well founded.

We considered other alternates. We considered them just to test them and see if they were more logical either in response to the physical situation or perhaps into market or public need, and it would be my -- Well, I might review those.

Q. Yes. Based on the information that you gathered, this factual background, then did you consider various alternatives for feasible development of the situation?

A. Yes.

Q. And what alternatives did you consider?

A. Going from the least to the highest, of course, doing nothing was not our charge, that is, so that the least productive consideration in terms of urbanization would be agriculture. Well, we did not have the testimony of the previous witness. We've had enough experience to -- I worked the coastal areas of San Diego County -- that we considered that the agricultural use of the property was probably inappropriate. We based this upon the observation of the plant materials and other
[127] experiences that we've had in the coastal areas, so we rejected that. It, of course, is not designated as agricultural on the general plan.

So then we considered the probability of residential use. While the general facilities are available, we did realize that in 1972 there was -- had been resistance to further residential construction in this part of the community, and that weighed in our thinking. In addition, we had a tendency to try to avoid placing residential construction in areas that are subject to inundation or in which you have to design so that structures themselves are above safe flood levels, but certain portions of the property are below. You add that to the fact that the property is bordered by a railroad, by industrial uses to the southeast and by a highway. It doesn't enjoy the advantages of view that say the mesa property might, and culminated in the fact that it's not in accordance with the general plan, then you reject the residential use.

Well, I think it's fair to examine something in between the industrial and residential classification generally known as recreation, commercial; that is, a multitude of possible uses. One would be a golf course, a recreation vehicle park, similar uses. Well, we dealt with a number of golf courses in the projects in which we've been the engineer, and it was apparent to us that in light of our experience that a golf course -- an effort to make a golf course on this property would be
[128] tenuous -- the results would be tenuous principally because a golf course must be well drained on the surface and in the subsurface. We would have to bring in about as much dirt to create a golf course in the area as we would have to build an industrial project, and we knew that other clients, principally the golf course at La Costa, which had been built in a low area with poor drainage suffered under considerable added expense and difficulty for a number of years, so the forecast and the prognosis for the physical operation of the gold [*sic*] course idea was not good.

Well, in addition -- In development, golf courses normally are a supplemental land use in that you try to create a golf course in the midst of a larger development in which the benefits of the golf course can be realized in the enhancement of land values whether they be commercial or residential in the properties that the developer owns around the golf course. Examples are at La Costa, Rancho Santa Fe, Rancho Bernardo, and the majority of privately developed golf courses. A free-standing golf course, that is, one in which it occupies the entire property owned by the owner of the golf course, is found more normally in public golf courses where the land, in effect, is not expected to show a return. Once again, however, if you refer back to the general plan which did not designate this property for commercial recreation, we considered the
[129] possibilities within the hundred and 200 acres, that one might place a motel, but if you examine the freeway intersection conditions between Mission Bay and Oceanside -- and we had worked on a number of those for the property owners at interchanges, we found, to my recollection, there was only one motel built just east or near and east of the Veterans Hospital in La Jolla, and we believe the reason that motel development has not been attractive is the proximity Mission Bay. Mission Bay is such a greater attraction than lower Penasquitos that there's little incentive for the considerable investment that this property does not have ready access to the beach. While it's within sight, it's not within walking distance as you find the motels in Mission Bay, so this tended to rule out that type of development. It's conceivable, and I certainly agree that a small recreation vehicle park might work. Those parks don't run to large sizes. Ten acres is a fairly good-sized one, and it's conceivable that that would be an economic use within the property. I don't really think that I'm qualified to discuss the economics of recreational vehicle parks; however, it's possible that 10 of the hundred and so acres of this property might be suitable. That generally is the gambit of uses.

Q. Okay. Then with the exception of the industrial in your analysis, you've ruled out the other alternative uses as being feasible?

A. From our experience in land planning and general engineering.
[130] You could do them physically, but in comparison and past projects, it seemed inappropriate and counter to the general plan designation.

Q. Then did you focus on the industrial possibility to determine whether it appeared to be feasible?

A. Yes. We prepared a plan for development and prepared a cost estimate for that development.

Q. Then based upon your investigation, what, in your opinion, was the highest and best use of the property in its condition just prior to June 1973?

A. We felt the highest and best uses were industrial on about 150 acres of it, and the balance should be devoted to an enlargement of the state park preserve.

Q. Then how did you -- You mentioned that you conducted a study on the industrial development in terms of feasibility from a practical and economic standpoint. How did you proceed with that detailed feasibility study?

A. Of course, the road system -- I've already talked about sewer and water, and those systems exist generlly down the spine of the property in reference to the exhibit.

Q. Plaintiff's 1?

A. Plaintiff's 1, it can be seen as a light line running generally from northwest to southeast, and that's the sewer fill that's been referred to previously. If you'll compare that photograph with the general plan, you'll note on the general plan a black line which is the northwesterly

. . . .

[135] developing would be the fact that it would be the situation that the development itself would have a need for some maintenance in that the silts generated upstream primarily on the east side of the highway, I-5, would tend to drop out, that is, would be deposited within the development. I don't view that as a major difficulty. It's a, in fact, simpler management problem is you have the property divided as large commercial properties, commercial or industrial in which there's a business responsibility than if it's divided in small pieces for individual residential responsibility or where this deposit is going to be made onto a golf course, and so we felt in light of our calculations and in light of work that we had done previously in Mission Valley that it was -- it would be a prudent and certainly normal development decision to construct an industrial park in a floodplain of this nature. We were untroubled by any adverse considerations.

Q. So that it appears that you've covered the physical aspects, the circulation, the utilities and the flood aspects. Did you give consideration to land use control aspects that might be involved with industrial development?

A. Yes. In dealing with -- In making decisions as to what's an appropriate land use, you must consider the public interest, and it was our judgment that the available industrial zones -- that the MIP zone is the appropriate one. That requires -- Well, it's an industrial park zone and
[136] that one should look forward to complying with the provisions of that zone, that is, it's one which controls the environmental considerations, noise, smoke, and view requires 25 percent of the individual's sight [*sic*] to be landscaped, and these are important considerations. We appreciated the fact that it would be well to enhance the view from the freeway to the west, so the plan that we considered asumes a removal of cut bank, relatively small cut bank on the west side of I-5 which obstructs the view of the freeway to the ocean. We felt in 1972 we had just secured a permit for similar work near Interstate 5. Further, the design -- we felt that it would be one that was reasonable to expect approval on, did not get out into the tidal areas, in fact, held back from that portion of the property.

Q. I take it then these were in the nature of concessions when you start to make the property attractive for obtaining the --

A. I think the principal factor is that the importance of employment opportunity in the San Diego area, as opposed to other potential uses for the land and its extension, is a logical extension to a rather well-done industrial park to the southeast.

Q. Now, Mr. Slayter yesterday told us about the influence of tidal action. Exhibit -- Plaintiff's 16 in evidence -- he testified that tidal action is limited to the area indicated there in greenish-blue. Then he also
[137] indicated that he had placed another line upon Plaintiff's 16 which is lime green and indicated "limit of development." Does that correspond to the area that you considered for trial development in your feasibility study?

A. Yes.

Q. So that you considered no industrial use of the subject property west of the lime green limiting line?

A. Correct.

Q. Then what would have been proposed for the use of the property to the west?

A. That it be left in its natural state and offered to the State of California to augment the Torrey Pines Park preserve.

Q. Mr. Rick, on Plaintiff's 1, I've put down the next overlay which we'll ask to be identifed as Plaintiff's 1-E. Would you approach the exhibit?

(Plaintiff's Exhibit No. 1-E was marked for identification.)

Does Plaintiff's 1-E illustrate the concept that you were approaching in determining the feasibility of the property for industrial development?

A. Yes.

Q. And would you then indicate for the Court on Plaintiff's 1-E the area contemplated for industrial development and the area contemplated to be reserved in the original state?

[138] A. The limits contemplated for industrial development are the westerly line of Freeway I-5 and its interchange at Carmel Valley Road; at the southeast, generally the line of the northwesterly extent of the industrial development shown on the exhibit as buildings in the photograph; then the southwesterly limit would be the line of the railroad right-of-way up to the line shown on the previous exhibit as a lime green line; then the westerly -- northwesterly limit is the continuation extent of the lime green line until it meets Carmel Valley, so --

Q. So that the boundary that we see between the green shading and the brown shading on Plaintiff's 1-E is substantially similar to the lime green line on Plaintiff's 9?

A. Yes.

Q. And then Plaintiff's 1-E also depicts the extension of Sorrento Valley Road through the property as you previously testified. Would you resume the stand?

THE COURT: Mr. Goebel, this is a convenient time for our morning recess. We'll be in recess for approximately 10 minutes.

(Recess.)

BY MR. GOEBEL:

Q. Mr. Rick, before the recess, we were talking about your feasibility study for a possible industrial development for this property. Did
[139] you perform, in general terms, cost estimates to determine the feasibility of a plan of this nature?

A. Yes. We tried to put those cost estimates back to mid-1973.

Q. What development cost per acre of usable land did you arrive at?

A. $24,000.

Q. In your opinion, is a development cost one which developers were willing and able to bear as of June 1973?

A. Yes.

Q. Now, that development cost estimate includes the cost of filling the land and providing the utilities and arriving at a manufactured lot?

A. Manufactured lot cost had a certain allowance for enhancing the -- for some public interest investment in the 77 acres to the west or at the channel entrance. It did not include the site development landscaping or the buildings themselves.

Q. But when you were indicating what the developers were able to bear --

A. So that I had a comparable figure or a figure comparable with other projects and other figures that we had experienced.

Q. In arriving at the net usable acre, is it considered that the owner of the subject property would have to give up any further use of the
[140] approximately 77 acres that you had indicated would be desirable to give to the state or otherwise preserve?

A. Correct.

Q. Then in your opinion, a development along the general lines as depicted on Plaintiff's Exhibit 1-E was economically feasible in June of 1973 and a reasonable period thereafter?

A. Yes.

Q. In your opinion, was there a reasonable probability of obtaining all necessary governmental approvals for such a development during that period of time?

A. I feel so.

. . . .

BY MR. GOEBEL:

[143] Q. Well, Mr. Rick, you've established previously in your testimony, as I understood it, that aside from industrial, in your judgment, based upon the physical characteristics of the property and the existing land use designations even in the before condition, no type -- no use other than industrial were feasible; is that right?

A. Correct. To use -- It's my opinion that to make an economic use of the property shown in brown on, I guess it's 1-E, which is the subject of the discussion, that the developer is going to have to alter the present land form significantly. It's -- That's the basis from which you start, and when you alter the land form significantly, you're tampering with the property in its natural state.

Q. Well, you would then agree that in the after condition as well as in the before condition, all forms of development other than industrial are ruled out?

A. Yes. They're ruled out in the before condition which I presume is the condition in which the open space designation does not apply -- rule out for a variety of reasons.

MR. SUMPTION: Object as far as the open space designation is concerned, the rules.

MR. GOEBE: [*sic*] He was just attempting to describe the before condition.

BY MR. GOEBEL:

[144] Q. Don't -- In your testimony, avoid discussion of the open space condition. Assume that the before condition is the condition that existed prior to June of 1973.

A. All right. In that condition, the assumption is that one may alter the property to accommodate the development under certain restraints which have been part of my previous testimony. Under those conditions, it's my conclusion that the proper use is for industrial purposes.

Q. And was it also your conclusion that any other form of development other than industrial was not feasible?

A. Inappropriate, not feasible.

Q. Now, was there anything to change your conclusion that all forms of development other than industrial were not feasible in the after condition; that is, after the property had been designated for open space?

A. No.

Q. So in the after condition, without regard to designation as open space, all forms of development other than industrial were not feasible?

A. Correct.

Q. Okay. Now, based upon your knowledge and experience in this field and upon the advice of counsel that you previously referred to, in your opinion, is industrial development of any nature feasible in the after condition, after condition being after the property had been designated

. . . .

CROSS-EXAMINATION

BY MR. SUMPTION:

[145] Q. Mr. Rick, could you tell me when you did the feasibility studies? Were they done at one time or over a period of time?

A. They were done over a period of time between, say, June of 1975 through December of 1975.

Q. Had you had occasion to do any studies with relation to the subject property prior to that date?

A. Not to the extent which we did in this instance.

Q. As I understand your testimony then, your studies were done in relation to two time periods, one in what we've been referring to as the before condition and one in the after?

[146] A. Correct.

Q. Did you take into consideration the underlying zoning of the property in both the before and the after condition?

A. Yes.

Q. What was the zoning in the before condition?

A. It consisted of two zones, one an agricultural designation and one an industrial designation comprising the total property.

Q. Each of those two zones would have been applied on some portion of the property?

A. It just happened that they were.

Q. Could you describe generally by direction or location.

A. Generally speaking, the southwest, to my recollection, the southwesterly portion of the property was designated industrial; and the northeasterly was agricultural.

Q. In your feasibility study as far as uses other than industrial, what portions of the property were you concerned with?

A. We generally -- I limited myself to the area designated as brown for the reasons that I previously stated of the general public interest, and I felt that the area shown on the exhibit in green precluded consideration of development in the area with a general need for some quid pro quo as far as securing necessary permits is concerned.

[147] Q. In other words, you're referring to Exhibit 1-E, are you not?

A. Yes, sir.

Q. In other words, for both of your feasibility studies, one for industrial use and one for any other potential use that you testified you considered, you based it on the configuration shown on Plaintiff's 1-E wherein a portion of the property designated in green to the northwest was more or less ruled out of consideration as far as actual development?

A. Yes. The securing of approvals from public agencies often depends on the willingness to provide some public betterment, in this case, enlargement of the Torrey Pines Park, and that opinion of mine comes from the fact that the area's affected, in part, by tidal action. It's a resource area of small value.

Q. Is that portion not referred to as the lagoon on --

A. Oh, there are various definitions of lagoon. I prefer to keep to the one that calls a lagoon one that has tidal water effect.

Q. Are you familiar with the terminology "estuary"?

A. I've used the term. Once again, I think you're -- my understanding of the term "estuary" is that it's a lagoon connected to the ocean, generally a salt water situation; whereas a lagoon is a lake, is a form of lagoon, and the terminology is a little looser, but once again, I don't

. . . .

land use today or in 1973 or whenever?

[152] A. I think it's called a progress guide; is it not?

Q. In connection with your feasibility studies, did you conclude or find that various portions of the property other than what's shown as the green area in Plaintiff's 1-E were also subject to inundation by water or flooding?

A. Yes; except for the higher grounds east of the present Sorrento Valley Road. That property in brown is subject to inundation for the reasons I pointed out, that is, you have a sand plug at the ocean outlet, and so when it rains --

Q. In fact, I believe you testified that that might create some sort of problem in connection with the feasibility of residential use?

A. Yes, I did.

Q. I believe, Mr. Rick, you mentioned a figure of 150 acres for industrial use, is that --

A. 135 is the figure. I stand corrected. I was going from memory and not with the exhibit in front of me.

Q. But what you were referring to is --

A. The area of brown, yes, sir.

Q. Thank you. Mr. Rick, were you, in connection with your feasibility study -- Have you testified before the City Planning Commission or City Council in connection with this proposition and your findings?

A. No, sir.

[153] Q. Have you conveyed the results of your studies to members of the Planning Department and staff?

A. No, sir.

Q. To your knowledge, has the plaintiff ever applied for permission to develop according to your feasibility studies?

A. Not to my knowledge.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Rick, you referred to public betterments in respect to the area in green on Plaintiff's E-1, and I think you referred to some remedial work at the area of the plug and also the creation of a Least Tern nesting area. Did you include those public betterments within your cost estimates?

A. I included a sum of money representing what we felt was a reasonable contribution towards those betterments.

Q. Okay. Now, Mr. Sumption just asked you if the plaintiff has applied for development for the property, and based on the plan developed in your feasibility study. Now, you, in the course of dealing with clients, frequently represent the client before the public agencies, and you're without the benefit of counsel; isn't that right?

A. That's correct.

Q. And you're frequently in the position of advising

. . . .

[156] Q. Mr. Rick, on the basis of your professional experience, and assuming that the property was in the condition after June 19, 1973, as it had been designated as open space, would you have advised this property owner to spend the money necessary to go forward with an industrial development plan for the --

MR. SUMPTION: Your Honor, I'll object on the grounds of relevancy.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. GOEBEL:

Q. What's the basis for your opinion?

A. Earlier -- Well, my work and recommendations, of course, must follow in light of some experience with the Code under which I'm working, the Municipal Code, and the Municipal Code, as I recall, is pretty specific in its definition of open space, and I think the words --

MR. SUMPTION: To the extent this witness is going to testify as to his interpretation of the Municipal Code, I'll object on the grounds that he's not qualified.

THE COURT: It's not being offered for his interpretation. It's being offered as a basis for his opinion that he would not have advised the plaintiff to proceed, so it's overruled.

[157] THE WITNESS: Once again, the recollection maybe is faulty, but I think it refers to land essentially in its natural condition or natural state, and as I previously testified, I believe, there is no economic use of the property which I felt could be made, whether the highest or the least, would not involve a significant change in the -- from the natural condition of the property. Hence, I feel that I could not have recommended that the owner or prospective owner expend the moneys necessary to pursue a plan in light of that definition.

MR. GOEBEL: No further questions, your Honor.

MR. SUMPTION: No further questions, your Honor.

EXAMINATION

BY THE COURT:

Q. Mr. Rick, I'm somewhat confused by one of your statements. Is it your opinion that the open space designation precludes, for example, a golf course?

A. No, not generally. Certainly not in other jurisdictions in which we've dealt. The thing that troubles me is the -- is the definition of open space that I find in the Code that requires it to be essentially in its natural condition, because to create a golf course on this property, you have to import a considerable amount of soil needed to raise it up above the obviously unsuitable natural soils.

Q. What distance are you referring to, sir? What would be required, three inches or 35 feet?

[158] A. No. Three to four feet, maybe five feet depending on the mounding, but once -- we considered in the before condition the potential of a golf course and its suitability and rejected in on economic grounds rather than practical grounds.

Q. I understand that. How much would you raise it if you were going to put an industrial park --

A. Raise it a minimum of four -- three to four and higher where the building pads are to go. I believe you might conceivably import a little less material for a golf course than you would an industrial park.

Q. And so your opinion is based on your premise that the Municipal Code precludes the bringing in of some three or four feet of unnatural soil?

A. In answer to the after condition, yes; yes, sir.

Q. You earlier tetified that, generally speaking, golf courses to be economically feasible, other than those erected or maintained by public agencies, are done so to assist the developer in selling or enhancing the property which surrounds the golf course; is that correct?

A. Yes. In effect, you are shifting your land basis to the surrounding property and reducing the land basis to the golf course, so the economic return requirement is less.

Q. There are, of course, a number of exceptions?

A. Oh, Singing Hills was an exception, but Singing Hills is now moving into development of surrounding lands.

Excerpts from testimony of **Joseph Gallagher**:
(called as witness by the plaintiff)

. . . .

[250] Q. Your business or occupation?

A. Real estate appraiser.

. . . .

[254] Q. Specifically, have you gained any experience in the area of utilization of land for golf courses?

A. I have.

. . . .

Q. Were you employed by the plaintiff in this matter to make an appraisal of the subject property?

A. I was.

Q. And you are familiar with the subject property being that property located west of Interstate 5 and south of Carmel Valley Road in the City of San Diego?

A. Yes.

. . . .

[261] Q. Mr. Gallagher, in giving your summary, you might summarize briefly the components of the assemblage and give an overall figure rather than going through each detail of it.

A. The critical area from the appraisal standpoint, in my judgment, represented the portion of the assembly from Carmel Valley Road south and between I-5 and the railroad right-of-way, and that area comprising approximately 255.10 acres was acquired from four entities including the City of San Diego itself. The total cost of the assembly was $1,775,146. The acquisition extended over the period of April to September of 1966.

Q. Okay. Now, you had -- were telling us how you proceeded to conduct your investigation. Have you completed, in general terms, the extent of your investigation?

[262] A. Well, there were many other steps taken, but I think that I outlined the more important of the basic steps between -- in arriving at the opinion that I have.

Q. Would you then define the term "highest and best use"?

A. I understand the term "highest and best use" to mean that it's the highest and best use of the land and that use -- it is that use which prudence dictates will, over a reasonably foreseeable period of time, produce for the typical owner the highest net return or benefits, thus reflecting the highest capital asset value and will generally at the same time preserve the utility of the property. It's also sometimes described as being the most profitable and likely use to which a property can be put.

Q. Okay. After your investigation, as you've detailed to us, did you form an opinion as to the highest and best use of the subject property in which we refer to as the before condition or that condition that existed with respect to the property prior to the actions of the City of San Diego in June of 1973?

A. Yes.

Q. What was that opinion?

A. In my opinion, the highest and best use of the appraised property in the before situation was that the majority of the property had the best use of being developed as a modern industrial park.

[263]. Q. What were the bases for reaching that opinion?

A. Among the more important reasons, in my opinion, were the following: First, that the City of San Diego general plan of 1990, adopted December 15th, 1967, indicated industrial use for almost all of the property; second, the January 1972 adopted revised general plan indicated industrial use for subject property; three, most of the land was zoned M-1-A, an industrial designation; four, the San Diego Gas & Electric Company itself assembled the appraised property by purchase for a proposed industrial use; five, part of the assemblage was a parcel purchased from the City of San Diego itself, that was zoned industrially at the time of acquisition; six, adjacent lands extending southerly from

the property from Sorrento Valley was zoned for industrial use; next, the trend of development in Sorrento Valley and southerly of the subject property was and is to industrial usage; in addition, our investigation indicated a strong demand among industrial users for locations in the vicinity of the subject property. Also, interviews with district developers indicated a strong demand for the subject property itself for industrial use had it been available. Next, feasibility studies by Rick Engineering Company indicated that industrial development for the appraised property was economically feasible. Also, the land is ideally situated with respect to access, availability of utilities and site prominence for industrial development. These were the major reasons. There are others of a minor nature, but these were the most important, in my judgment.

[264] Q. Then, now would you describe briefly your interpretation of the major approaches to valuation of real property and indicate which were applicable to this situation.

A. There are three primary approaches or appraisal approaches to value. These include what is called the market data approach; another is the cost approach; and the third basic approach is known as the income approach, and the underlying theory of all three approaches is the theory of substitution.

As an example, the market data approach, the underlying theory is that a prudent investor is not warranted in paying more for a given piece of property, everything else being equal, than he would for an equally desirable piece of property subject to the same influences. This is the approach that involves the research into other sales of comparable properties in the vicinity of the land being appraised.

Under the cost approach, the underlying theory is that one isn't warranted in paying more for an improved piece of property than he could go out and buy the land and construct an equally desirable improvement at today's cost.

I used -- Under the income approach, the same type of theory of substitution applies. In that one one would not be prudent in paying more for an income-producing piece of real estate that he could buy -- go out and buy a substitute piece that would offer the same type of return and the same kind of risk. The approaches that I felt were most applicable to this appraisal problem were first -- the primary one was the market data approach, the value indicated for subject property based

upon the sales of other properties having the same highest and best use, the same potential and located within the same area.

[265] I used a modified cost approach as a check on the value indicated by the market approach, and this modified cost approach involved the request of Rick Engineering Company to do a feasibility study about the potential development of the appraised property and the cost to bring it to a manufactured state. From this, a -- by residual process, a residual land value was arrived at as a check on the opinion produced by the market data approach.

As an additional check on the value indicated by the market data approach, I researched, as I've already testified, the assembly cost, the actual acquisition cost by the San Diego Gas & Electric Company in 1966, only seven years before the date of value, and applied the trends indicated by the sales of other properties during the intervening nine-year period to the original cost of the San Diego Gas & Electric Company feeling that there is no better indication of the value of an appraised piece of property than the price that may have been paid for it or the price at which it may have been sold. You can't find a more comparable situation.

[266] Q. Then have you arrived at an opinion as to the fair market value of the subject property for its highest and best use in the before condition, that is, in the condition that existed prior to the actions of the City in June 1973?

A. I have.

Q. What is the opinion?

A. $4,200,000.

Q. And briefly, upon what do you base that opinion then?

A. Well, I probably testified to some of the reasons, but as a brief summary, it was based upon an extensive review of comparable sales in the area, interviews with developers of industrial lands in the area, analysis of the trends and absorption rates of industrial properties in the general area. It was based upon the residual land process by having a -- not relying on just my own judgment, but obtaining the expertise of an entity such as Rick Engineering Company to actually work out the probable cost that would be involved in making the land usable for industrial purposes, the trending of the original --

Q. Just a moment. Let me stop you at the last point. We have in evidence here from Mr. Rick that his feasibility study determined that the development cost per acre to get the land to a mnaufactured [*sic*] state would be approximately $24,000. Is that information that you relied upon?

A. It was.

[267] Q. And is it your opinion that that development cost is a cost which persons in the market were willing and able to bear for that condition as of the date of value that you had reference to?

A. It was.

Q. Okay. Then you were proceeding into the trending.

A. I was merely adding that another reason for the opinion was the results produced by trending the original acquisiton [*sic*] costs forward to the date of value as a check on the opinion that I reached based on the market data approach to value. Those were the primary reasons.

Q. Have you also conducted an investigation in an attempt to determine the highest and best use of the property in the after condition, that is, the condition that existed after the actions of the City in June of 1973?

A. Yes, I did.

Q. How did you proceed with that investigation?

A. It was difficult. First, in trying to ascertain, subject to the open space policy designation, what uses the land could be put to, in connection with trying to reach a conclusion with reference to the after highest and best use, I secured various material published by the City on the subject trying to find a definition for the uses that land subject to an open policy designation could be used.

Included in that research was securing copies of what you have handed me as Exhibits 1 and 2 entitled "A Plan for the Preservation of Natural Parks for San Diego."

[268] Q. Excuse me, Mr. Gallagher. There's a "1" and "2" written on that booket, [*sic*] but I think the evidentiary designation is otherwise. Read the orange tag.

A. Correction. It's Plaintiff's Exhibits 10 and 11, and with reference to these publications, I was struck by some of the printed material within the books that helped, at least, for me to explain the difficulties of the problem I have been confronted by. As an example in the interrogatory portion at Page 1, there's a heading, open space -- attempt at definition. Under that, it reads:

> "Although definitions of 'open space' abound, clearly no one of them has yet attained universal acceptance, nor is this surprising for open space by its very nature resists explicit delineation. One of the more recognizable difficulties surely is that 'open space' means different things to different people for different reasons."

The publication also continues to a pertinent section, in my opinion, where it reads:

> "More recently, state legislature defined 'open space land' as 'any parcel or area of land or water which is essentially unimproved and devoted to an open space use.
>
> "The latter term 'open space use' is defined as 'the use of land for, one, public recreation; two, enjoyment of senic [*sic*] beauty; three, conservation or use of natural resources; or four, production of food or fiber."

[269] Now, those categories, as I read them, only set up one productive potential use for a landowner whose property has been classified as open space, and that's the production of food or fiber which is an agricultural type use, and I know that already in this case has appeared an agronomist who has stated that soild [*sic*] conditions within the subject property are such that an agricultural use would be practically eliminated. This certainly supports the conclusion that I had reached from my own numerous investigations of the property with the high saline content of the land and the fact that flooding conditions exist at times, and in addition, even if the soil conditions were such that if filled, you then could support an agricultural use, the cost of that filling in order to cure the flood problem, in my judgment, would eliminate agricultural uses as being economic.

Also, I received from yourself and Mr. Worley, I believe, who has previously testified, the legal opinion that any subdivision would have to be consistent with an open space designation. Before arriving at a conclusion, I also considered the possibility of golf course usage of the appraised property. I related my own personal experience in both

appraising and being involved with the open space of a golf course, but in addition, interviewed Mr. Ted Vallis, V-a-l-l-i-s, who is the founder and president of Golf Course Inns of America as well as International Golf -- I better get that name correct -- Golf Inns International. This gentleman is operating the corporation -- owns and operates three golf courses here in Southern California, the closest one being Whispering Palms about two miles north of the appraised property as well as golf courses throughout portions of Europe. In connection with that interview, Mr. Vallis accompanied us down to look at the property, and the bottom line of his judgment was that even if filled, he wouldn't take the appraised property as a gift for golf course usage, and he had numerous reasons for it which have been supported by our own findings.

[270] First, we're dealing with a gross usage area of approximately 135 acres that would be available for a good recreation course, and in his judgment, even if the land were adaptable, it would be very tight by the time one set aside areas for tennis courts, the club house, and the other sporting facilities, but more important were two elements that he was -- he forcefully brought to our attention of the 63 courses located in San Diego County, 24 of them would be in direct competition, in his judgment, with any kind of a golf course development on the subject property. Of those 63, at the present time only five are either breaking even or making any money of any kind. These included such courses as Cottonwood, Singing Hills, Stardust, Pala Mesa and Whispering Palms, his own golf course. When queried on why this was the case, why the ones that he mentioned were making money in contrast to the other courses, he quoted several reasons as an example. The cost data as compared with these -- said another way, the courses that were making money were courses built many, many years ago. Singing Hills was a prime example, in his mind. When that course was developed, land cost out there was in a nominal $200, $400 an acre. It cost about $6,000 a hole to produce the course that he estimated the maximum cost when it was built at $250,000. Yet to produce the same kind of course today at Singing Hills would be about two million five. In support of that judgment, he mentioned the fact that nine holes were added at La Costa not too long ago at a cost of $100,000 per hole. A course in Oceanside is not quite fininshed, [*sic*] and it already has cost over $55,000 a hole, and they still have many things to do on it, but these --

[271] Another, of course, most important fact was that even if filled, in his judgment, the saline content of the overlying soil conditions were percolating through and making it almost impossible to support all of the planting and lawn area and things of that sort that would be required for a golf course, and there's a final judgment also -- this is from a golf course standpoint -- it would have to be judged fairly -- it doesn't have much character. It's flat land, and while grading could produce rolling greens and lower and higher elevations, it still would not have the attractive environment and topographical characteristics to make a desirable golf course.

[272] Q. Did you examine any other potential uses consistent with the open space designation?

A. Yes. I considered whether or not there was a potential for some minor uses, oh, such as an RV, vehicular park, and in my judgment, only a small area or small portion of the appraised property would be adaptable to that use even assuming the open space designation would permit it, and I cannot get -- have not been able to get a clear indication that it would, but even then, the grading that would be required, the filling that would be required and the fact that only a tiny segment of land, in my judgment, could be used, ruled that out as a possibility.

Q. Then based upon your investigation and your expert opinion, did you determine an opinion as to the highest and best use of the property in the after condition?

A. The only thing -- Yes, I have.

Q. What was it?

A. The only thing that I can conclude, the highest and best use of the property under the open space designation would be public ownership as open space with -- and, of course, this would produce no revenue to a landowner.

[273] Q. In your opinion, is the property marketable in the after condition?

A. No.

Q. Upon what do you base that opinion?

A. Primarily on the fact that an investor would be -- would be able to obtain, in my opinion, no clear-cut prediction -- he couldn't arrive at a clear-cut prediction nor could it be indicated by any of the sources that an informed purchaser would go to that -- would indicate that he could go ahead and produce it in any fashion that would produce income on his investment.

Q. Have you attempted to confirm this opinion?

A. Yes, I have, both in referring to the opinions of witnesses who have previously testified in this case, reading depositions of governmental officials that have been -- whose depositions were taken prior to the start of the trial, my own research into the subject, the examination and reading of the open space designation definitions -- those were some of the reasons:

Q. Have you also consulted with possibly purchasers?

A. Yes. Several of the developers of the industrial land within the area were interviewed about whether or not they would invest in the subject property subject to the open space designation, and again, the answer is that they wouldn't touch it, not knowing what they could do with it.

[274] Q. Again based on the opinion as to the highest and best use of the property, do you have an opinion as to its fair market value in the after condition?

A. I do.

Q. What was that?

A. I feel that in view of the limited potential uses that remain to the property, that it can't have more than nominal value. The nominal value that I assigned is somewhat arbitrary in -- $161,000, which is the equivalent of $1,000 per acre for the gross usable portion, and even this is based on the fact that within my appraisal experience I found lands out in remote areas of the desert that don't have any immediate or near term potential use, yet there are investors or purchasers in the marketplace who will still pay a nominal value for that type of land.

MR. GOEBEL: Okay. No further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. SUMPTION:

Q. Mr. Gallagher, you restified, [*sic*] I believe, that it was your opinion prior to June of 1973, the majority of the property had a best use for a modern industrial park; is that not correct?

A. Yes, sir.

Q. Would you indicate what portion you're referring to

. . . .

general plan?

[276] A. I don't recall it at this moment.

Pardon me. Before -- I just want to see whether I do have that date with me.

The question was what, again, just --

Q. Whether you're aware of the date for implementation of the City of San Diego general plan?

A. I don't find it at the moment.

Q. Well, are you aware that there was a date of implementation sometime off in the future?

A. Yes. I'm sure that there was.

Q. Mr. Gallagher, you also indicated, I believe, in your testimony that you secured various City documents in order to assist you in determining what the property may be used for in its after condition, that is, after June of 1973. One of those documents you referred to was the open space booklet that's marked for identification as Plaintiff's Nos. 10 and 11; is that not correct?

A. That's correct.

Q. Are you aware of any legal interpretation as to the effect of designating property open space in a general plan that has been given by the City Attorney's office for the City of San Diego?

A. No, I'm not.

Q. Are you aware of any application for the use of this particular property, that is, application to the City?

[277] A. Well, I do in one fashion because it was known when the property was acquired from the -- a portion of the property was acquired from the City of San Diego that it was being acquired at that time as a potential site for a nuclear power plant.

Q. But are you aware of any actual application for use of this parcel of property, subject property?

A. Not of formal application, no.

Q. In fact, doesn't Plaintiff's Exhibit 11 have language in the test that would allow use for a nuclear power plant?

A. I don't recall that.

Q. Would that have any effect on your opinion of value in either the before or after condition if -- Well, strike that.

Would it have any effect on your opinion in the after condition if it were a fact that the open space plan provides for use as a nuclear power plant?

A. It could have if -- Well, it could have.

Q. Did you consider what effects it may have?

A. No.

Q. Mr. Gallagher, I believe you said you relied on opinions from attorneys including Mr. Goebel and Mr. Don Worley as far as their interpretation of the effect of designating property open space in a general plan; is that not correct:

[278] A. That's correct.

Q. Did you do any studies on your own insofar as the likelihood of the City allowing a use in accordance with the underlying zoning subsequent to its applying the open space designation on the subject property?

A. Yes.

Q. What were those studies?

A. Well, one example would be in discussing potential golf course usage with Mr. Vallis, he mentioned the fact that he was generally familiar with two instances where golf course usage was proposed within land that had an open space designation. One was in the -- as I recall, in the vicinity of Escondido, and the other was in San Diego County, and according to his information, neither one of them were successful in getting those uses through under the open space element.

Q. Theses were jurisdictions other than the City of San Diego.

A. Yes, uh-huh.

Q. I believe you indicated, also, Mr. Gallagher, that other documents you referred to were depositions of certain city employees in this case?

A. Correct.

Q. Did you read the deposition of James Goff?

A. I'm sure I did.

Q. Can you recall anything in that deposition that would lend support to your opinion that the City would not allow a use for the subject property in accordance with the underlying zoning?

[279] A. You better give me the first part of that question, if you will, please.

Q. In your review of Mr. Goff's desposition, do you recall whether there was anything in that deposition that would lend support to your apparent ultimate conclusion that the City would not allow any use for the subject property in accordance with its underlying zoning?

A. I don't recall at this moment whether there was or was not. It seems to me though that he did -- did talk -- or in response to some questions -- I just recall indistinctly at this time.

Q. Do you recall, in fact, that in Mr. Goff's deposition he indicated that an open space designation and industrial underlying zoning were not inconsistent?

A. I recall now that you've referred my memory that there was a statement of that nature.

Q. Do you recall his interpretation as to why he so concluded?

A. No, I don't.

Q. Do you recall him stating that the open space designation is not zoning, per se?

A. It seems to me that I do.

Q. Do you recall anything in any of the other depositions that you looked at that would lend support -- insofar as depositions of City employees that would lend support to your opinion or conclusion that the City of San Diego would not allow use of the property in accordance with its underlying zoning?

[280] A. I don't recall any specific ones at this moment. I would have to review them, but I recall that the impression I got that was supported by the balance of the research is that it's a pretty muddy area, and as I've testified, that no one investing in the property could, with any certainty, base a purchase price on what he was probably going to be permitted to do with the land under the open space designation.

Q. Now, the latter part of your statement is something that you formed a conclusion on; is that correct? That didn't come from testimony in depositions of City employees.

A. Well, the first part of my response certainly did. I had the impression from reading the multitude of depositions that it was certainly not a clear-out situation.

MR. SUMPTION: I have no further questions of this witness, your Honor.

THE COURT: Any redirect?

MR. GOEBEL: Yes.

. . . .

BY MR. GOEBEL:

[284] Q. Mr. Gallagher, have you reviewed the open space plan, Plaintiff's 10 and 11 for any reference to possible use of this subject property for a nuclear power plant?

A. I have.

Q. And have you located a reference to that effect?

[285] A. I have.

Q. What does that reference state and where is it found?

A. It's found on -- It's the last paragraph on Page 24 of the publication, "A PLan for the Preservation of Natural Parks for San Diego," and it reads:

> "As in the Tia Juana River Valley subsystem, the San Diego Gas & Electric Company has a large 240-acre ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality."

Q. Okay. I think counsel will stipulate that it's found in Plaintiff's 11 and not in Plaintiff's 10. We made a reference to Page 24, and --

THE COURT: Last paragraph of Page 24?

MR. SUMPTION: Yes. That's correct.

BY MR. GOEBEL:

Q. Now, Mr. Gallagher, does that reference that you've just read affect your opinion of the highest and best use and value of the property in the after condition?

A. No.

[286] Q. And why not?

A. Because it's my understanding that the -- that language resulted from meetings between the members of the San Diego Gas & Electric Company and City Planning, but at the time the language was created, only a portion of the property was designated as open space, approximately the northerly half. The southerly portion was not, and it was mutually understood at that time that -- and the language was based on the understanding that if a nuclear power plant would go in, it would go in on the land that was not designated as open space.

Since that time, the entire property has been desiganted as open space which is an entirely different situation, and based on what has happened, the problems of constructing and getting approvals for other power plants like San Onofre and other areas, and that, combined with the fact that the total property is designated open space as of the date of value in the after situation, and based on the qualifying phrases that even under the best circumstances a number of approvals and clearances would have to be obtained, I just don't think that it would be reasonably probable to assume that under these set of circumstances that a nuclear power plant could be constructed on the subject property, and as the appraiser is constantly dealing with reasonable probabilities, the facts and influences line up, in my judgment, hard on the negative side.

. . . .

EXAMINATION

BY THE COURT:

[290] Q. Mr. Gallagher, you testified in your opinion the highest and best use of the subject property in its after condition was public ownership; is that correct?

A. Yes, your Honor.

. . . .

Exerpts from testimony of **James Goff**:
(called as witness by defendant)

. . . .

[333] THE COURT: The question, sir, is whether the open space designation is a zone.

THE WITNESS: It is not a zone as I would understand it under the Municipal Code as it applies to development regulations in the City of San Diego.

BY MR. SUMPTION:

Q. So that, in effect, if we have a situation where there is a piece of property such as the subject property designated as open space in the plan that I've referred to, and there is, in addition, a zone such as M-1-A or A-110 or whatever that has been applied on the property, would it be your interpretation that those two things are not inconsistent with one another?

A. That's correct, I would not judge them as being inconsistent.

Q. If the plaintiff were to apply for some sort of permission to build on the subject property in accordance with its underlying zoning, would your department recommend against such application on the sole basis that it's been designated for open space?

MR. GOEBEL: Objection. It calls for speculation on the part of the witness, and there's no proper foundation.

THE COURT: What is missing in the foundation, Mr. Goebel?

MR. GOEBEL: May we have the question back?

THE COURT: Read the question.

. . . .

[337] THE COURT: Yes, but all that Mr. Sumption is endeavoring to draw out is what recommendation would go to the City Council if and when he brings a witness in from the City Council or the Planning Commission to ask what they would do. That's something again. Right now, he's inquiring as to what -- that is, would there be a recommendation

against it solely on that ground. I believe the question is proper. Moreover, I have a further question that I will ask as soon as he answers this one.

You may answer the question if you remember it now.

THE WITNESS: My understanding of the question is, would we recommend against a development proposal in accordance with the underlying zoning solely because there was an open space designation on that particular property, and the answer is no.

THE COURT: That perhaps obviates my question, but the question that I would have asked otherwise is, would it have been proper for your department to have recommended against it solely on that basis whether you would have or not, as I understand your function as a Planning Department.

THE WITNESS: If I understand your question, I personally would not feel that it would be proper to come to that conclusion.

. . . .

[341] MR. SUMPTION: I guess it really only has bearing on application from the standpoint of what their potential action at some later time would be. I guess ultimately to come back to that same question.

THE COURT: Then, Mr. Goebel, my remarks a moment ago are applicable. Why would it not be relevant for that purpose?

MR. GOEBEL: To show what their actions were likely to be at some future time?

THE COURT: Yes. You have brought before the Court evidence that your client has not applied for relief or for permits because -- because of the advice given your client that it would be fruitless to do so. Now Mr. Sumption is offering advice given to the City Council as to the purpose for open space to rebut that. Why would that not be relevant?

MR. GOEBEL: Well, everybody indicates that the -- Nobody can predict the action of the City Council, whether the City Council is going to follow the advice of the attorney or not, so I'm saying it's speculative at the very least.

THE COURT: But is not the opinion -- are not the opinions heretofore introduced speculative based on the information available to them, namely, what they remembered in No. 11, the discussions they've had with various prospective developers and the like, and now on the other side of that is what the City Council was told the purpose

. . . .

[343] If you now recall in general or specific terms any advice given to the Council on that date by Mr. Conrad, you may relate it.

THE WITNESS: In general, I remember the Deputy City Attorney advising the Council as a result of questions from the Council as to whether the adoption of the open space -- the plan for the preservation of open space would, in fact, deep-freeze the property, and the gist of the response from the City -- Deputy City Attorney was, no, that was not the case, that reasonable efforts to acquire this property were under way in connection with a pending or anticipated successful bond issue, but that the underlying zoning would have to be judged should someone desire to develop their property, and the kind of development would be related to the requirements and restrictions on that underlying zoning.

BY MR. SUMPTION:

Q. All right. Mr. Goff, subsequent to the failure of the September of 1973 ballot proposition for the open space bond, did you become aware of any alterations in the Community Development Department's open space acquisition program?

A. No, I did not, sir.

Q. Were you aware at any time subsequent to the failure of that bond issue that the Community Development Department removed some properties that had been designated for open space in the open space plan?

. . . .

[361] . . . It's customary in industrial uses, particularly of the type that are taking place further to the southeast in Sorrento Valley, to divide the property into smaller parcels that what B-1 is showing there, isn't it?

A. Given that situation, we probably would require a subdivision map in connection with a development proposal, yes, sir.

Q. And for any division of the property for purposes of, say, leasing or financing would require a subdivision map?

A. I believe that the answer is yes. There may be some technicality that I'm unaware of, but I think the answer generally is yes.

Q. In your position as Planning Director requires you to be familiar with the various legal requirements of the Government Code with respect to open space and also the Subdivision Map Act, doesn't it?

A. Yes, I would like to be reasonably conversant. I'm sure that I'm not in all respects, but --

Q. In fact, the provisions of the Subdivision Map Act are also administered to your department, right?

A. Well, they are processed through our department. We're not the only department that has a direct role in making recommendations on subdivision maps.

Q. I understand. We have had here testimony about your department in the area of general planning and also talked about it in the area of rezoning. Your department is also generally responsible for the operational aspects of processing subdivision maps, right?

[362] A. Yes, that's what I was intending to imply.

Q. And through the Subdivision Review Board, of which the Planning Department has a member and makes a recommendation, do you process the subdivision maps at the beginning level?

A. Yes, sir.

Q. And in the event of appeal, they go to the Planning Commission of the City of San Diego?

A. Yes, sir.

Q. So the Planning Department would be required to generate a recommendation on any subdivision map, right?

A. Well, the Subdivision Review Board, of which we are one of three members, yes, sir.

Q. But as to the land use planning features of the subdivision map, the Planning Department would be responsible?

A. Yes, but I think what you're talking about is the zoning that we would be more concerned with in terms of land use. I'm not really sure that I'm speaking the kind of answers that you're asking.

Q. The other two members of the Subdivision Review Board relate to matters unrelated to ones we're talking about here in court. You have traffic, and who is the other member?

A. Well, you have two members from the manager's -- under the manager's jurisdiction, but they would be concerned with not only traffic, but sewers, utilities, a whole host of additional factors.

[363] Q. Okay. I show you a provision of the Government Code, Section 66473.5 and ask you to review that.

A. Just this section right here?

Q. Yes.

A. All right.

Q. Now, that section states, in substance, that no local agency shall approve a map unless the legislative body shall find that the proposed subdivision is consistent with the general plan, right?

A. Yes, sir.

Q. Now, the open space element which we have before us here as Plaintiff's 10 and 11, the green book, is an element of the general plan, isn't it?

A. Yes, sir.

Q. So when we talk about the general plan in these various legal provisions, you understand that the general plan means, in part, the open space element?

A. Yes, sir.

Q. And when we're referring here to the proposed subdivision, you intend that to mean a proposed subdivision map such as we've discussed would be customarily required for industrial development on the subject property?

A. Yes, sir.

Q. Then would you read the following section, 66474.

[364] A. Okay.

Q. And that states, in pertinent part here that a legislative body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings: That the proposed map is not consistent with applicable general and specific plans -- isn't that a fair statement of what it says on that subject?

A. In general, yes, sir.

Q. And that says, "Shall deny approval," correct?

A. Yes, sir.

Q. Is it your interpretation from that provision that that means that it is in the disjunctive, that is, that only one of those findings has to be made in order to require denial?

A. I believe that's the case. If it does not --

Q. Look at it again, if you need to.

A. Yes, it says, "If it makes any of the following."

Q. So then you would agree with -- Strike that.

You would generally interpret in the performance of your duties that the Government Code then not only permits but requires that a subdivision map be denied if the legislative body makes a finding that the subdivision is inconsistent with the general plan?

A. If they make a finding that it is inconsistent, yes, sir.

Q. And they're required to consider -- or, that is, they can just not refuse to address the subject. They're affirmatively required to address whether it's consistent?

[365] A. I believe the answer is yes. I'm not understanding the point you're making, but --

Q. Now, I ask you to refer to Section 66 -- excuse me, 65567. Would you review that to yourself, please.

A. I've read it.

Q. And that states that no building permit may be issued, no subdivision map approved, and no open space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open space plan; is that right?

A. Yes, sir.

Q. So again, you would view that -- from your interpretation, there would have to be an affirmative determination that the proposal was consistent with the -- not only the general plan, but the open space element of the general plan?

A. Yes, sir.

Q. Now, is your testimony then that an industrial development proposal which would contemplate a division of the property into more than four parcels, such as indicated on Exhibit 1-E, could, under any circumstances, be consistent with the open space designation?

A. I don't understand your question. You said if it's divided into four parcels as indicated, and I can't see -- there was something about a categorical conclusion.

[366] Q. Let me set the basis. I want you to be sure you understand the question.

You agreed with me previously, I think, that industrial development for a parcel this size would probably require a subdivision map?

A. Yes, sir.

Q. That's customarily required of four or more parcels?

A. Yes, sir.

Q. And from your experience, that would be the customary thing that would happen if a party wanted to develop this property for industrial purposes?

A. Yes, sir.

Q. So then my question was, assuming that that's the case, and assuming further that this property has been designated for open space as it was on June 19, 1973, are you then telling me that your department would not find any proposed industrial development consistent with the open space plan?

A. Well, the question suggests to me that it's a very conceivable possibility we would agree. That's my understanding of your question, and it would be hard for me to conclude that, but I would say in general I would imagine that an industrial development in that area would be consistent or could be very well consistent with the general plan and with the Torrey Pines Community Plan.

[367] Q. Well, could -- Can you define for me what you mean by consistent?

A. Something that we would find when we're reviewing the subdivision regulations that we were just looking at, that would put us in a position of recommending approval of a particular project that we would not conclude that the meaning construed from that ordinance language and applied to that particular project in that area would result in an inconsistency. I don't really know how to define it other than they're compatible. There must be other words that you can use, but they would be consistent.

Q. Well, isn't it a fact that most, if not all, industrial subdivisions that you received and reviewed in the Planning Department contemplate the building -- the building of buildings on each of the lots defined in the map?

A. I think generally so, but not without appropriate open space within the project itself which I would find would be one method of determining whether there was consistency.

Q. So if a large enough percentage of open space were reserved, you might find it to be consistent?

A. I don't know whether it might be a percentage. It might be in the nature of the design.

Q. To your knowledge, does the City have any single controlling definition on the subject of open space that's consistently applied?

[368] A. Well, I think there's a general definition of the meaning and intent of open space in the planning for the preservation of natural parks.

Q. Well, if I understood your testimony previously, you agreed with me that one of the things that was required of your department to

discharge its duties under the Government Code was to review any plan and determine if it was consistent with the open space plan?

A. That would be one of our charges, yes, sir.

Q. Now, when you conduct this process of review, do you have a single definition of open space that you consistently apply?

A. Well, we would be guided by the policy that's contained in that plan, the language that describes the intent and purpose of open space.

Q. Well, I understand that you would be guided by the policy and so forth, but is there any single definition of open space that you consistently apply?

A. I don't think that there is such a thing as a single definition. I think open space can be achieved in a number of different ways.

Q. Would you review --

A. Within the meaning particularly of that plan.

Q. Would you review the plan and see if you can locate the definition that you have reference to as being part of this plan?

[369] A. I believe the definition is indicated in here on Page 2, and it's underlined:

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: When you read, sir, would you mind reading a little slower?

THE WITNESS: I apologize. Should -- Should -- I guess I should read it again.

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: You've read from Exhibit 11, have you, sir? Or did you read from 10?

THE WITNESS: This is from the plan -- I don't know the number of it.

MR. GOEBEL: Plaintiff's 10.

THE COURT: Plaintiff's 10.

MR. GOEBEL: I'll highlight it in red.

THE WITNESS: This is the definition we've indicated for most purposes we would utilize. The report does have some other indications of open space that would also be considered, but this is perhaps the most simple definition of it that we've incorporated in the document.

BY MR. GOEBEL:

[370] Q. I've highlighted then in red the part that you've read into the record; is that right?

A. Yes, sir.

Q. Now, immediately above that, there's a definition that at least the plan represents as found in the City of San Diego Municipal Code; isn't that right?

A. Yes, sir.

Q. Do you subscribe to that one, also?

A. Yes, sir. I think the whole intent of the section in the report is to indicate that there are a number of different ways that I can define open space, and certainly that would be one that we would have to subscribe to.

Q. Well, in carrying out your charge to determine whether a particular subdivision map is consistent with the open space plan, do you apply the one that I've highlighted in red or the Code definition?

A. I would like to think that we would consider all of these.

Q. Well, would you read then the Code definition?

A. You're referring to this section right here?

Q. Yes.

A. "Open space land means any land or water area (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the progress guide and general plan for the City of San Diego as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

[371] Q. Let's highlight that in blue, if you would, just the part you read.

A. It's going to block it all out.

Q. You can read through that.

And you attempt to apply this definition in making your definitions, right?

A. Yes, sir.

Q. Now, do you consider that any industrial development on this portion of the subject property indicated in brown on Plaintiff's 1 across the way would leave the property primarily in its natural state?

A. I think there could be a design for industrial development on that property that would achieve essentially what's called for here, yes, sir. I haven't seen one, but I think that that's possible.

[372] Q. And do you think that that design would have the property with value for park and recreation purposes?

A. I think it could be either that or, as the definition indicates, complement the adjacent area for said purposes.

Q. In fact, the adoption of the open space element is not a static thing, is it?

A. I would assume over a period of time, that it would be periodically updated, yes, sir.

Q. Well, I guess I should be more precise in my question. In fact, once having adopted the open space element to the general plan, there falls upon the City a duty to bring its zoning into conformance with the open space element to the general plan; isn't that right?

A. We don't have any such thing as an open space zone that we could do what you're talking about.

Q. Again, I ask you to refer to the Government Code, and particularly Section 65860. Would you just review that to yourself?

A. Yes, sir.

Q. Okay, that provides, in substance, that County or City zoning ordinances shall be consistent with the general plan of the County or City by January 1, 1974, right?

A. Yes, sir.

Q. And the open space element is one aspect of the general plan, right?

[373] A. Yes, sir.

Q. And it further indicates that in the event a zoning ordinance becomes inconsistent with the general plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan?

A. Yes, sir.

Q. Therefore, if we were to assume for a moment that the M-1-A zoning is inconsistent with the open space designation, there would be an affirmative duty on the part of the City to amend the zoning ordinance to bring it into compliance, correct?

A. If you made that assumption that there was that inconsistency, yes, sir.

Q. And, in fact, since the adoption of the open space element in June, 1973, the Planning Department has conducted mass rezonings of various communities of the City to bring the zoning into compliance with the open space element; isn't that right?

A. No, sir.

Q. Well, didn't, in fact, the college area undergo a rezoning which was initiated, in part at least, by the open space element to the general plan?

A. No, sir, I don't believe that's a fair characterization of the action. The action was an intent to make the development regulations, that is, the zoning, conform to the development proposals in a community plan, and very often, you'll find instances where there will be a preference for open space preservation in areas, but with the recognition that they require or there would be required steps that might not be within the purview of the City to execute, that there should be some alternative use for the property, and what we were doing to the State College area, as I recall, was merely making the underlying zoning consistent with those development proposals which were alternatives to acquisition and preservation or no development whatsoever, and it's a very common situation that we face. It's a particular example in the area that we're talking about here where there are proposals for open space, there are also alternatives for the appropriate backup zoning, so to speak.

[374] Q. Well, you're saying that in the Torrey Pines Community Plan there exist properties which, while being designated as possible open space, contain an alternative land use expressly indicate; is that right?

A. Yes, sir.

Q. The subject property is not one of those properties, is it?

A. A portion of the subject property is indicated in the Torrey Pines Community Plan for further valuation, yes, sir.

Q. But that language is not in the same form as the language that's used in the other parcels that you had reference to.

[375] A. I don't understand your question, sir.

Q. You have not designated any other parcels with that particular type of language, have you?

A. In the Torrey Pines plan, sir, I don't recall that we do, no, sir.

Q. In fact, in the Torrey Pines plan on those parcels that you have reference to, it says that if the property is not acquired for public purposes within 18 months, then the property owner may develop it to a certain specific residential density; isn't that right?

A. I recall that there is that stipulation added to that.

Q. But no stipulation or system limit is set with respect to the subject property?

A. The portion of the subject property is not even recommended for open space or industrial or whatever. It's indicated, as I stated, it's under -- it's an area for further study.

Q. And you're referring essentially to the designtion found at Page 94 of Defendant's Exhibit D?

A. In reference to the area for further study, yes, sir.

Q. The area shows in white, and it has the language "Future use under study"?

A. Yes, sir.

Q. What is your interpretation of the meaning of "Future use under study"?

[376] A. It means that the ultimate disposition of that in terms of recommendations as far as the City Council is concerned are awaiting various studies to give clues as to what would be appropriate uses in those areas. The property is in the industrial zone at the present time, but there is some consideration in the study for perhaps some alternative.

Q. Now, in fact, your department studied the subject property for approximately eight months prior to the actions of the City in June of 1973; isn't that right?

A. If you're referring to the recommendations on zoning which emanated from the City Council, I'm not sure how we scheduled it, but there was a study of that nature, yes, sir.

Q. And wasn't it the determination of the Operations Division of your department that the parcel shown as B on Plaintiff's Exhibit 1 should remain in the industrial zone?

A. Given the information that we had available at the time, yes, sir.

Q. And that action was ultimately taken by the Council on June 7 of 1973, right?

A. I believe so, sir.

Q. And then on June 19, 1973, another division of your department recommended that that very same property be designated for open space; isn't that right?

A. I believe that's correct, sir.

Q. And then in 1975, you're telling us that once again your department is recommending that there be more studies conducted on the parcel referred to as B on Plaintiff's 1?

[377] A. To undertake studies that were not undertaken in connection with the rezoning consideration, yes, sir.

Q. And are there any such studies in progress at this time?

A. It's my understanding that there are, but they're not within the purview of the City of San Diego.

Q. The City is not doing any studies at this time?

A. Not to my knowledge, sir.

. . . .

Exerpts from testimony of **Kenneth Klein**:
(called as witness by defendant)

. . . .

[382] Q. What was the ultimate action by the City Council with respect to the rezoning?

A. They concurred with both the department and the Planning Commission with respect to the rezoning which I've just outlined.

Q. Were you present, Mr. Klein, at the April 11, 1973 Planning Commission Hearing?

A. I believe so, yes.

Q. Do you recall whether or not representatives of the San Diego Gas & Electric Company appeared at that hearing?

A. I believe they did, yes.

Q. Do you recall whether a Mr. Frank DeVore representing the Gas & Electric Company was present at that hearing?

A. I have reviewed those minutes, and yes, he was present.

Q. Do you recall, Mr. Klein, whether or not Mr. DeVore responded to questions asked him by members of the Planning Commission with respect to the rezoning of this property?

A. Yes, he did.

Q. Do you recall the nature of those questions and Mr. DeVore's response?

A. I can recall, and my memory was refreshed by reading in the minutes that someone just before the vote was taken on the matter asked Mr. DeVore if this rezoning would have any effect on the Gas & Electric Company's plans, and Mr. DeVore responded that he felt it would not have any effect on the long-range plans of the development of this land.

[383] Q. Do you recall whether Mr. DeVore or anyone else representing the Gas & Electric Company at that hearing voiced any concern for use of the property for industrial purposes?

A. I don't recall -- in terms of the area that was rezoned?

Q. Yes.

A. I don't recall that, no.

Q. Do you recall whether any reference -- any similar reference was made to any other portion of the subject property?

A. I believe they did discuss the possibility of a power plant facility being placed on the other portion of the property that remained in the M-1-A or nestled into the hill or something of that nature was discussed at the time.

Q. Mr. Klein, are you generally familiar with uses that may be permitted through the vehicle of a conditional use permit?

A. Yes.

Q. Does the City of San Diego have specific uses that may be made for property regardless of the underlying zoning through this vehicle?

A. Yes.

[384] Q. Could you describe -- Strike that.

Have you made an attempt to determine whether any uses allowed by the conditional use permit might be reasonably made for the northerly portion of the subject property, and when I refer to the northerly portion, I mean generally to the north of the line that bisects the property east, in an east and west direction?

A. Yes, I think there are uses that are permitted under a conditional use permit that could lend themselves to this property.

Q. Would you tell us what those uses are, please?

A. Let me refer to my planning zone regulations. I will just enumerate some of the uses that would be conceivable under a use permit. Basically, in any zone, first of all, electric distribution and gas stations serving the immediate area, parking facilities -- I think this might be a pretty significant one because if adjacent industrial zoned property were developed, parking could be provided within the area that is in the A-110 zone or was rezoned A-110 under a conditional use permit. These would be uses that the permit could be granted by the zoning administrator.

Moving on, other uses that would be possible in this zone -- boarding kennels for dogs and cats and any agricultural, industrial or commerical zone, in this case both the industrial or the agricultural would qualify -- building structures and uses operated by a public utility. Under the present ownership, of course, they could come in for any use under this provision if they did remain the owner of the property. Private recreational facilities, golf courses, driving ranges, pitch-and-putt golf courses, minature golf courses, research, development and testing laboratories and facilities which would encompass broad range of scientific facilities or industrial research and development -- in addition, camping parks together with incidental facilities in any commerical or industrial zone except the SR and any agricultural or floodway zone -- these uses would be permitted.

I think this generally, in reviewing the conditional use permit, would be uses that can be considered for development of that portion that was placed in the agricultural zone.

[385] Q. Mr. Klein, do you recall whether or not at the hearings on the rezoning before the Planning Commission or the City Council, whether any representative of the Gas & Electric Company presented any evidence with regard to the economic feasibility of making use of the property in light of the recommendation for rezoning?

A. I do not recall any such evidence being submitted.

. . . .

THE COURT

SAN DIEGO, CALIFORNIA, WEDNESDAY, JANUARY 28, 1976, 10:00 A.M.

[411] THE COURT: Good morning, gentlemen. The Court has had an opportunity to go over the documents received in evidence and the cases that were cited during argument and also to review notes taken during the testimony.

The Court has concluded that the plaintiff has established by a preponderance of the evidence that there was a taking of the property pursuant to the authorities concerning inverse condemnation, and the Court therefore finds liability on the part of the defendant; accordingly, we are ready to proceed with the damage aspect of the case. I might comment that the case cited by the plaintiff with regard to the exhaustion of administrative remedies was somewhat less than persuasive in light of the fact that the Court took the liberty of going back and reading the case relied on, the *Ogo* (phonetic spelling) case. The *Ogo* case simply says that there is an exception to the exhaustion of administrative remedies doctrine when the aggrieved party can positively state what the administrative decision in his particular case would be. Now, if that's all we had, then we would logically determine in this case that by a preponderance of the evidence the opinions stated could lead the Court to the conclusion that those opinions are a statement by the plaintiff of what the administrative agency's decision would be; however, the case relied on was that of *Gastner vs. Mantern*
[412] *Company* (phonetic spelling), and when one reads that case, the language used therein was that by a long line of decisions, the Commission had made plain its views as to the law applicable to a situation similar to the one being litigated, and that therefore it would habe [*sic*] been an idle act to have asked for review by the Commission. The Court in the *Gastner* case held that the Court could not presume that the Commission, having adopted a particular rule or policy in like cases in the past, would necessarily have applied the same rule in the case at bar. Then they qualify it. The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the Commission has declared what its ruling will be in the particular case, and in the *Gastner* case, the petitioner therein was unable to do that.

Typically, we find a situation where an Appellate Court in its decision has relied on an earlier decision which decision does not support the opinion of the Appellate Court. Nonetheless, looking at the other aspects of the *Ogo* case and the circumstances of this case, the Court still is of the opinion that that doctrine has been met.

MR. GOEBEL: I cited also the *Snead* case, and I think *Snead* raises the question of whether the doctrine is even applicable in this situation.

THE COURT: That's another aspect of the Court's reasoning for ruling as it has done, but I wanted to clarify your presentation of those cases in any event.

[413] MR. SUMPTION: Your Honor, I have two items that I would like to be heard on. One is perhaps some clarification of the extent of the Court's ruling, and the other is, I would like to be heard as far as proceeding immediately with the damage phase of the trial. I don't know if the Court prefers one before the other.

THE COURT: Whichever you prefer to present first, I'll hear you on.

MR. SUMPTION: Well, as far as the ruling is concerned, your Honor, by your statements, I take it that what you're saying is there has been established a taking as opposed to a damaging.

THE COURT: That's correct.

MR. SUMPTION: And also, you indicated the property -- and I assume from that you're referring to the property -- the subject property in its entirety rather than certain portions thereof --

THE COURT: That is also correct.

MR. SUMPTION: And also, I believe implicit in the Court's ruling would then be that the Court has rejected the defendant's contention that the appropriate remedy would be declaratory relief as opposed to money damages?

THE COURT: Yes, sir.

. . . .

EXHIBITS

Document	Page
Defendant's Exhibit G Memorandum to City Council, dated June 19, 1973	154
Plaintiff's Exhibit 11, Pages 1,2,10,24 "Plan for the Preservation of Natural Parks for San Diego	156
Plaintiff's Exhibit 22 Memorandum, dated June 27, 1972; Transcripts of Council Conference on Open Space, March 16, 1972	161
Plaintiff's Exhibit 22A Minutes of Council Meeting March 16, 1972	162

CITY of SAN DIEGO
MEMORANDUM

FILE NO.:

DATE: The Honorable Mayor and City Council

FROM: City Planning Commission

SUBJECT: Open Space Plan

The hearing at this time concerns a proposal to adopt an open space plan.

Section 65563 of the State Planning and Zoning Law declares that, "On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency, a local open-space plan for the comprehensive and long-range preservation of open-space plan for the comprehensive and long-range preservation of open-space land within its jurisdiction. . ." To meet this requirement, the department has prepared an open space plan described in the report, *A Plan for the Preservation of Natural Parks for San Diego.* This plan primarily emphasizes preservation of San Diego's stream canyons and valleys. Five major subsystems of City-wide significance are identified, along with nearly a score of community-related subsystems. In numerical terms, the total system projected encompasses approximately 51,000 acres, of which about 23,000 are already publicly owned. An additional 17,000 acres are designated for "limited development under zoning," while the remaining 11,000 acres are proposed for acquisition.

On May 16 and 23, 1973, the Planning Commission considered the proposed plan at a noticed public hearing. At the conclusion of the hearing, which is recorded on pages 320 through 324 of the Planning Commission minutes for 1973, the Commission voted 5-0 to approve and recommend adoption of the open space plan as represented by the report, *A Plan for the Preservation of Natural Parks for San Diego*, a report addendum, and Exhibit Maps "A" and "B". Opposition was essentially limited to a spokesman for the Penasquitos Corporation,

EXHIBIT "G"

who objected to the estimated acquisition acreages applied to certain properties.

James L. Goff
Planning Director

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EXHIBIT "G"

A PLAN FOR THE PRESERVATION OF NATURAL PARKS FOR SAN DIEGO

An Open Space Plan for San Diego City required by State Government Code, as amended by Chapter 251, Statutes of 1972:

65563. On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiciton. . . . . .

65564. Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan.

65566. Any action by a county or city which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

65567. No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

CITY PLANNING DEPARTMENT
GENERAL PLANNING SECTION
CITY ADMINISTRATION BUILDING
COMMUNITY CONCOURSE
SAN DIEGO, CALIFORNIA 92101
APRIL, 1973

Plaintiff's
EXHIBIT "11"

CHAPTER 1 - INTRODUCTION

By recent legislative enactment, the State of California has decreed that

> On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction.[1]

This Plan for the Preservation of Natural Parks in its entirety is intended to constitute a local open space plan for the City of San Diego. Following adoption by the Council, it will be submitted to the Secretary of the Resources Agency.

At the same time, this report is also intended to serve as one of a series of eight background reports on various of the elements that will collectively comprise the City's revised General Plan. The latter is scheduled to emerge from an extensive process of comprehensive review sometime in 1973.

OPEN SPACE - AN ATTEMPT AT DEFINITION

Although definitions of "open space" abound, clearly no one of them has yet attained universal acceptance. Nor is this surprising, for open space by its very nature resists explicit delineation. One of the more recognizable difficulties, surely, is that "open space means different things to different people for different reasons."[2]

As might be surmised, somewhat differing definitions of open space have been set forth in various legislative enactments. Under the Housing Act of 1961, open space land was defined as any undeveloped or predominantly undeveloped land in an urban area which has value

---

[1]Portion of Section 65563 of the *Government Code* as amended by Chapter 251, Statutes of 1972.

[2]California Legislature, *Joint Committee on Open Land Final Report*, Feb. 1970, p. 51.

Plaintiff's
EXHIBIT "11"

for (a) park and recreational purposes, (b) conservation of land and other resources, or (c) historic or scenic purposes.[3]

A 1959 California statute authorizing cities and counties to expend public funds for the acquisition of open space declared that:

> . . . an "open space" or "open area" is any place or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.[4]

More recently, state legislation defined "open-space land" as "any parcel or area of land or water which is essentially unimproved and devoted to an open space use . . . ."[5] The latter term, "open-space use", is defined as "the use of land for (1) public recreation, (2) enjoyment of scenic beauty, (3) conservation or use of natural resources, or (4) production of food or fiber."[6]

Within the City of San Diego Municipal Code, the following definition is found:

> "Open space land" means any land or water area:
>
> (1) which is primarily in its natural state and has value for park and recreation purposes, and
> (2) which, in the opinion of the City Council of the City,
> (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for The City of San Diego" as amended, and

---

[3]U.S. Congress, *Housing Act of 1961*, Sec. 706, Public Law 87-70, 87th Cong., 1st Sess., 1961.

[4]California, *Government Code* (1972), Sec. 6954.

[5]California, *Government Code* (1972), Sec. 65560.

[6]*Ibid.*

Plaintiff's
EXHIBIT "11"

(b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources.[7]

For most purposes of this plan report it is desirable that open space bear a definition that is both simplified and encompassing. Consequently, as generally used hereafter, open space should be understood to mean *any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.*

THE USES AND IMPORTANCE OF OPEN SPACE

The past two decades have witnessed a phenomenal upwelling of public interest in open space and its preservation. Accompanying this surge and heavily contributing to it has been a mass of published materials covering virtually all aspects of open space. So many of these materials have dealt so extensively with the uses and importance of open space that little needs be added here. Consequently, the discussion

. . . .

Recent changes in the State Subdivision Map Act should considerably strengthen the utility of the subdivision regulation process as a means of preserving open space. Most notably, Assembly Bill 1301, enacted in the 1971 legislative session and effective in March 1972, provides in part that

> A governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:
>
> (a) That the proposed map is not consistent with applicable general and specific plans.[9] . . . . . .

---

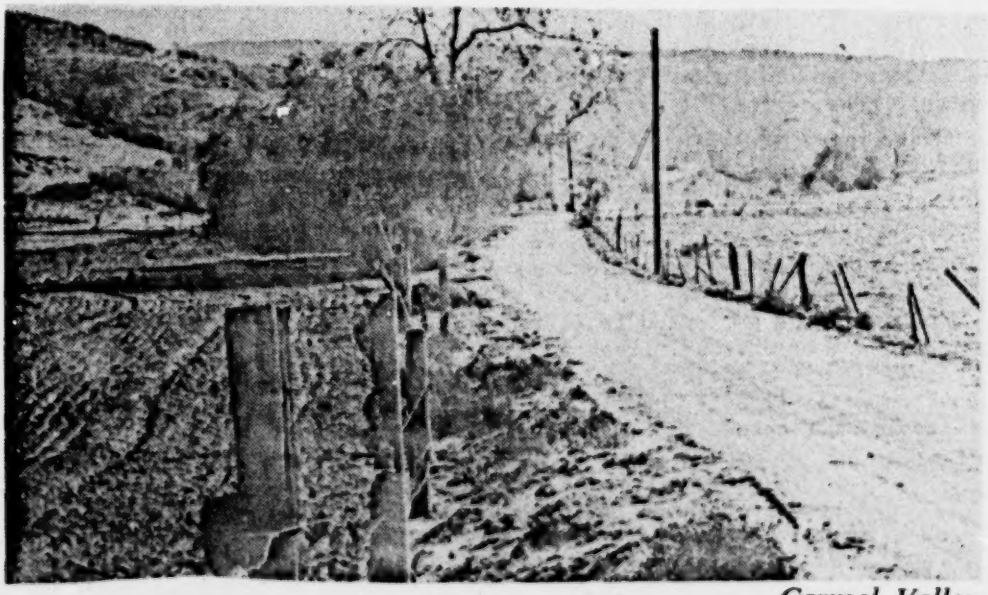
[7]San Diego Municipal Code, Sec. 61.0601.

[9]California, *Business and Professions Code* (1972), Sec. 11549.5.

As might be expected, the views from Black Mountain are outstanding and the views of it from surrounding lower areas add much to the place-identity of North City. Although the City has a 200 acre park site near the summit and owns an additional 90 acres nearby, it does not now own the summit itself. The City is proposing to acquire some 240 acres which include the higher areas and surrounding steep slopes.

LOS PENASQUITOS LAGOON-CARMEL VALLEY-McGONIGLE CANYON

Los Penasquitos Lagoon, although separated from Carmel Valley and McGonigle Canyon by the San Diego Freeway, is an extremely important part of this subsystem. Its value as a wildlife habitat for many marine and terrestrial animals and plants should not be underemphasized. Because the entire subsystem is being encroached upon by urban development, efforts to assure its preservation should be undertaken as soon as practicable.



Carmel Valley

As in the Tia Juana River Valley Subsystem, the San Diego Gas & Electric Company has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality.

Plaintiff's
EXHIBIT "11"

CITY of SAN DIEGO
MEMORANDUM

June 27, 1972

File

MDS

Transcript of Council Conference on Open Space, March 16, 1972

Moore - regional systems involve other governmental agencies, and therefore more complex participation issues are involved.

Sub-regional systems are more immediate, clearly requiring City initiative.

Goff - There are interchangeable aspects between regional and sub-regional systems;
they can interchange.

Moore - Our financing capability is better related to the sub-regional system. Other agencies will be involved in acquiring the regional system.

Morrow opposed to use of term, "acquisition," would prefer to exhaust possibilities offered by agricultural and floodplain zoning. Also opposed to priority list of open spaces, since such a list could cause the owners of the parcels concerned to raise their asking prices.

Planning and City Attorney are directed to prepare a schedule of those open space areas on which City could proceed to initiate agricultural, floodplain, and/or LC rezoning.

Plaintiff's
EXHIBIT "22"

COUNCIL CONFERENCE
3:15 p.m.
Thursday, March 16, 1972
Conference Room

ATTENDANCE Present: Councilmen Johnson, O'Connor, Landt, Morrow, Martinet, Bates, and Mayor Wilson.
Absent: Councilmen Williams and Hitch.
Also Present: City Manager Moore, Assistant to the City Manager Lockwood, Deputy City Attorney Valderhaug, and Recreation Director, Pauline des Granges.

. . . .

OPEN SPACE BOND ISSUE Mr. Moore announced that the purpose of the Conference was to get down to cases and recognize city-wide open spaces. He gave a brief resume of his report on the needs and financing of the Open Space System; recommending that not more than 2/3's of the Environmental Fund be ear-marked for open space acquisition, and further recommended the Auditor's six-year scheduling of bond sales.

Mr. Goff gave a presentation of inventory of areas designated as desirable for acquisition as open space.

Mr. MacFarlane presented an evaluation of lands listed in the inventory.

Mr. Sage spoke on available methods of financing with suggested alternates:

1. Special Environmental Growth Fund and General Obligation Bonds.

this method would provide a substantial portion of the funding requirements for the program at a

reasonable borrowing cost. It would have no effect on the property tax rate provided the Council did not eliminate the Special Environmental Growth Fund. A two-thirds affirmative vote of the electorate would be required to issue general obligation bonds.

2. Charter Change. A Charter change could be placed on the ballot whereby the Special Environmental Growth Fund would be established by Charter, calling for a fixed percentage of the San Diego Gas & Electric Company annual franchise fees to be placed in the fund for open space and authorizing the City Council to incur debt for open space purposes using the monies available in the established fund.

Only a majority vote of the electorate would be necessary to pass the Charter change. It would establish and restrict certain funds for a definite environmental program and would provide the Council with flexibility in amending the program.

Mr. Moore stated that the primary thing the Council should resolve at this Conference is the tentative approval of the tentative system; resolve which election it is going to go on, and what portion of the Environmental Fund they wish to pledge for this particular purpose; recommending they consider 2/3's of that fund for this purpose.

Mayor Wilson stated it was his opinion that the General Obligation Bond would give the City the best rate, and what the people needed, in order to pass it, was the assurance that it would not cost them anything; which is what the City can give them by the action of the Council.

Plaintiff's
EXHIBIT "22A"

Councilman Martinet moved that an Ordinance be placed on the docket adding a proposition to the Special Municipal Election Ordinance providing a Charter Amendment pledging 2/3's of the franchise fee for the purpose of debt service and retirement of the principal for bonds for the purpose of acquisition of open space for parks. This was seconded by Councilman Morrow and carried unanimously.

On motion of Councilman Martinet, seconded by Councilman Morrow, the Planning Director and the City Attorney were directed to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

Deputy City Attorney Bulens stated he thought there should be a Resolution passed by the Council authorizing the Attorney's Office to work with the Bond Counsel.

Councilman Bates moved that the Planning Department be directed to report back after studying as to the propriety of the proceedings with further flood plain zoning on flood plains located within the City. Councilman Landt seconded this motion which carried unanimously.

ADJOURNMENT The meeting was adjourned at 5:34 p.m.

Ann Jollett
Recording Secretary

Plaintiff's
EXHIBIT "22A"

APPENDIX "A"

INVALIDATION -- A REMEDY?

In 1969, Richard Roe acquired Blackacre, a 20-acre parcel of unimproved land in the coastal area of a Southern California county. Investigation prior to purchase revealed that the land was located in the county, immediately adjacent to the growing city of Valverde. The land had no apparent limiting physical characteristics, and the county had been approving development for residential purposes on similarly situated land in the vicinity. Though located on the fringe of a drainage basin, the land was gently sloping and did not appear to be in any kind of flood plain proper.

Richard, a ranger with the State Department of Parks and Recreation, was married with two young children. The downpayment for the property was made from savings accumulated during the period of years that both he and his wife were employed early in their marriage.

Development for residential purposes within the county was available and processing of a planned subdivision in simple grid fashion was commenced. The property owner was approached by the City of Valverde with respect to annexation. The city indicated that it would bring sewer and water service and other municipal services to the property and that a well planned residential development of reasonable density would be favorably considered.

The property owner was persuaded by the city's proposal, since municipal services were not as readily available in the county's jurisdiction. A plan was developed for preplanning the property prior to annexation and the property was placed in a sewer assessment district with a proportionate cost of a major trunk sewer line assessed against the property.

1971 Processing of a planned residential development for the property commenced with the city.

1972 Processing delayed while the city implemented environmental impact report requirements pursuant to the *Friends of Mammoth* decision.

1973 Coastal Initiative went into effect.

1974 Planned residential development (hereinafter "PRD") delayed because of environmental impact report delay.

1975 PRD approved in concept.

Coastal permit applied for, but denied because of alleged discrepancy in the mapping of the flood plain designation by the county.

1977 New Coastal Act went into effect.

1978 Coastal permit denial invalidated, remand to Coastal Commission.

1979 Coastal permit again denied, this time because of potential prejudice of approval of the project to the preparation of the local coastal program.

1981 Denial of coastal permit invalidated and matter remanded to Coastal Commission.

PRD approval at the city expired. New application required, complying with all new rules and regulations.

1982 Updated assessment of environmental impact disclosed several fragments of Indian arrowheads on the property. The city required as a condition of approval of the PRD that a detailed archaeological survey of the property be made at an expense of approximately $50,000.

1985 City's condition on approval invalidated as patently unreasonable, matter remanded to city.

County and State Coastal Commission advocated the acquisition of the property by the public for "buffer reserve" in the drainage basin.

1986 Bond election held to raise funds to acquire the property for public use.

Bond election failed. Public interest in the property "expressly withdrawn".

1987 Approval of PRD denied because proposed use "inappropriate".

1990 Denial of PRD invalidated, matter remanded to city.

1991 Approval of PRD denied because residential density sought "too high for the area".

1993 Denial of PRD invalidated, matter remanded to city.

1994 Proposed project modified to reduce density by 20%.

Project approved, but subject to the condition that the property owner dedicate four acres of the property to the city for right of way and substation purposes for a proposed mass transit line which was included in the city's general plan.

1996 Condition requiring dedication invalidated as unreasonable, and the matter was remanded to the city.

Rezoning of property to one residence per 20 acres completed.

1999 Rezoning invalidated as unreasonable.

In the year 2000, his children, the assurance of whose education was one of the objectives of the original investment, had long since graduated from college with the benefit of government loans. Richard was thoroughly frustrated with the land use planning process in California. Despite the fact that he had paid real property taxes, sewer district assessments, insurance premiums for liability insurance, and enormous amounts for legal fees over the past 30 years, he decided to abandon any efforts to develop the property.

He offered to dedicate the property to the City of Valverde for no consideration. The city declined to accept the offer of dedication on the basis that to do so would take private property off the tax rolls, create a problem for the sewer assessment district, and create further liability exposure for the city.

After some effort, Richard located a non-profit conservancy entity which was willing to accept a gift of the property and deeded the property over to it. He took an income tax deduction for a charitable contribution in the amount of his initial investment. The Internal Revenue Service denied the deduction on the theory that based upon the planning history of the property for more than 20 years, the property apparently had no beneficial highest and best use and could have no more than a nominal fair market value.